Supreme Court, U.S.
FILED

981573 MAR 29 1999

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FARMERS INSURANCE EXCHANGE,

Petitioner,

v.

CHARLES THEODORE DENESHA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

CURTIS E. WOODS
SONNENSCHEIN NATH AND ROSENTHAL
4520 Main Street
Suite 1100
Kansas City, Missouri 64111
(816) 932-4400

LEONARD SINGER
Counsel of Record
BIOFF SINGER AND FINUCANE, LLP
104 West Ninth Street
Suite 400
Kansas City, Missouri 64105-1718
(816) 842-8770

Attorneys for Petitioner

152090

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

10788

QUESTIONS PRESENTED FOR REVIEW

1. The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, ("ADEA"), establishes a two-tiered liability scheme which requires proof of more than discrimination to support an award of liquidated damages. Under Missouri law, the recovery of punitive damages requires a threshold standard of "outrageousness" which surpasses that required for liquidated damages. The Eighth Circuit held that an inference of discriminatory animus was alone sufficient to support a punitive damages award. Does, as the court below held, the Constitution permit a plaintiff to recover punitive damages in an employment discrimination action merely by establishing an inference of discriminatory animus?

2. The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, ("ADEA"), requires the plaintiff to prove that the employer's reason for the employee's discharge was "because of" the employee's age. This Court has held that the plaintiff must prove that the "employer's proffered reason" for the discharge was a pretext for intentional discrimination. Can, as the court below held, a plaintiff prevail where he does not controvert the employer's proffered reason for the discharge from his job but, instead, relies upon evidence of the employer's treatment of him in other jobs "throughout the employee's tenure with the company"?

STATEMENT PURSUANT TO RULE 29.6

Petitioner is Farmers Insurance Exchange. Petitioner does not have any parent companies but has the following nonwholly owned subsidiaries: Civic Property & Casualty Company, Exact Property & Casualty Company, Farmers Insurance Company, Inc., Farmers Insurance Company of Arizona, Farmers Insurance Company of Idaho, Farmers Insurance Company of Oregon, Mid-Century Insurance Company, and Neighborhood Spirit Property & Casualty Company.

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Farmers Insurance Exchange, Petitioner, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 161 F.3d 491 (8th Cir. 1998). On December 29, 1998, the Court of Appeals denied Farmers' Petition for Rehearing and for Rehearing En Banc with four judges voting to grant the petition as to the punitive damages issue. (App. E) The principal opinion of the District Court (App. B) is reported at 976 F. Supp. 1276. The District Court judgment is App. D. The District Court opinion regarding equitable relief and attorneys' fees is App. C.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on November 3, 1998 (App. A). On December 29, 1998, the Court of Appeals denied the Petition for Rehearing and for Rehearing En Banc. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (App. F).

STATEMENT OF THE CASE

In 1975, Farmers Insurance Exchange ("Farmers") hired Charles Denesha ("Denesha") as a claims representative to investigate and settle claims by and against Farmers' insureds.

Denesha started as an Office Claims Representative (OCR) which is an entry level job handling the simplest property claims by telephone at a claims office. In 1979, Denesha became a Field Claims Representative (FCR) working in the field handling bodily injury liability claims. Until late 1992, Denesha worked at Farmers' Grandview, Missouri, branch claims office. In November 1992, as part of a consolidation, Farmers transferred Denesha and other FCRs to the Kansas City branch claims office. The Kansas City branch claims office was a stricter, "by the book" operation with higher performance expectations than the Grandview branch claims office.

Throughout the first half of 1993, Farmers counseled Denesha orally and in writing to improve his performance as an FCR. Denesha contended that Farmers' criticism of his FCR performance was unfair and inaccurate. Denesha also contended that, in late 1992 or early 1993, his supervisor said that he felt that the younger FCRs were running circles around the older FCRs and that the branch claims office manager said that he had to get rid of the old heads. Ultimately, in full compliance with its progressive discipline procedures, Farmers placed Denesha on probation in his FCR position. On October 7, 1993, after Denesha's performance did not improve, Farmers transferred Denesha, without reduction in pay, to the entry level OCR position.

Although admittedly fully capable of performing the OCR job, Denesha failed to perform satisfactorily. Denesha admitted the accuracy of the statistics upon which Farmers relied to show Denesha's deficient performance which was below the performance of other OCRs. As the trial court held,

> even viewing the evidence most favorably to plaintiff, it is undisputed that defendant was experiencing performance problems with plaintiff. . . . At the time of plaintiff's termination, defendant had received a number of complaints concerning plaintiff.

(App. 55a). Farmers again placed Denesha on probation but to no avail. Shortly before his discharge, Farmers gave Denesha a memorandum regarding his failure to handle many customers' claims; Denesha admitted that the memorandum was "100%" correct. Denesha also admitted that Farmers continued to receive customer complaints about him and at least half of the complaints were justified. Farmers received many more customer complaints regarding Denesha than it had received regarding anyone else. Denesha presented no evidence that Farmers had tolerated such poor performance and the volume of customer complaints regarding any other OCR. In full compliance with Farmers' established procedures, Farmers discharged Denesha on May 16, 1994.

BASIS FOR FEDERAL JURISDICTION AND DECISIONS BELOW

Jurisdiction in the United States District Court for the Western District of Missouri was invoked pursuant to 29 U.S.C. § 626(c), 28 U.S.C. § 1331, and 28 U.S.C. § 1367(a). On June 20, 1996, the jury returned a verdict for Denesha that age was a determining factor in his discharge, that age was a determining factor in the denial of a salary increase[1],

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1. This Petition for a Writ of Certiorari only concerns the discharge claim and the punitive damage issue and does not encompass the separate issue of the denial of salary increase for 1993.

that Farmers' actions were willful, and awarded $4 million in punitive damages. On July 28, 1998, the District Court denied Farmers' second amended motion for judgment as a matter of law, and in the alternative, motion for new trial, regarding the age discrimination verdict, granted Farmers' motion for judgment as a matter of law regarding the punitive damages verdict, awarded liquidated damages under the ADEA, and awarded attorneys' fees. On November 3, 1998, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's decision to deny Farmers' motion for judgment as a matter of law, and to award Mr. Denesha front pay. The Court reversed the District Court by reinstating the punitive damages award with remittitur in the amount of $700,000.

REASONS FOR GRANTING THE WRIT

There are two main issues worthy of review. First, in light of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, punitive damages should not be awarded to discrimination plaintiffs based solely upon a finding that the employer's decision-maker's conduct warranted an inference of intentional discrimination. Second, employment discrimination litigation will overwhelm the courts and businesses will be unable to determine how to comply with the law if, as the Eighth Circuit held, an employee could prevail on a discrimination claim because, regardless of the reason for the discharge, the employer had allegedly mistreated him in another prior job at any time "throughout the employee's tenure with the company".

I.

THE EIGHTH CIRCUIT'S HOLDING THAT EVIDENCE OF THE EMPLOYER'S DECISION-MAKER'S CONDUCT WHICH SUPPORTS AN INFERENCE OF DISCRIMINATORY ANIMUS IS ALONE SUFFICIENT TO JUSTIFY AN AWARD OF PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION CASES VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION AND CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH DECISIONS OF OTHER CIRCUIT COURTS.

The Eighth Circuit reversed the District Court's entry of judgment as a matter of law on Denesha's punitive damages claim under the Missouri Human Rights Act ("MHRA"), and remanded the case to the District Court with instructions to submit to Denesha remittitur in the amount of $700,000. The Eighth Circuit incorrectly held that the conduct of Denesha's supervisors

> permit an inference of discriminatory animus on the part of key decision makers, thus establishing the quantum of outrageousness necessary to support an award of punitive damages.

(App. at 22a). Thus, the Eighth Circuit equated a finding of intentional discrimination with a finding of outrageousness, a result which violates the Due Process Clause of the Fourteenth Amendment[2] and directly conflicts with the decisions of this Court and other Circuit Courts of Appeal.

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2. The Due Process Clause states as follows: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law;" U.S. Const. amend. XIV, §1.

To satisfy constitutional standards, punitive damages must be in an amount that is commensurate with the conduct which it is designed to deter. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996). In *Gore*, this Court held that a punitive damage award must have a rational relationship to a State's interests in punishment and deterrence or it "enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* According to the Court, exemplary damages "should reflect 'the enormity of [defendant's] offense'." *Id.* at 575. "[P]unitive damages may not 'be grossly out of proportion to the severity of the offense'." *Id.* at 576. *See also Smith v. Wade*, 461 U.S. 30, 54 (1983) (in determining the propriety of punitive damages awards, "[t]he focus is on the character of the tortfeasor's conduct — whether it is of the sort that calls for deterrence and punishment *over and beyond that provided by compensatory awards*.") (emphasis added).

The law in Missouri concerning punitive damages comports with these Due Process standards. Under Missouri law, the recovery of punitive damages requires a threshold showing of "actual outrageousness" that surpasses that required for compensatory or liquidated damages. *See Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. banc 1989). "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others." *Id. See also Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996) (court must consider the defendant's "malice or outrageousness"). The Missouri Supreme Court recently heightened this rigorous standard for punitive damages by holding that punitive damages must be established by clear and convincing evidence rather than merely a preponderance of the evidence. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc 1996). The

court determined that the higher clear and convincing standard must apply for punitive damages because punitive damages cases are "extraordinary" and are intended to punish, not to compensate the plaintiff. *Id.* at 110.

This Court has granted certiorari to determine the proper standard for punitive damages in employment discrimination cases. *Kolstad v. American Dental Association*, __ U.S. __, 1998 WL 440470 (November 2, 1998). *En banc*, the D.C. Circuit held that punitive damages may be imposed in discrimination cases only if the plaintiff proves egregious conduct beyond the intentional discrimination. As does *Kolstad*, this case presents the important issue regarding the establishment of the proper parameters for an award of punitive damages in employment discrimination cases.

The Eighth Circuit's decision violates the principles which this Court has established regarding punitive damages. Under the Eighth Circuit's incorrect standard, an "inference of discriminatory animus" based upon decision-makers' conduct automatically entitles the claimant to punitive damages. (App. at 22a). If the Eighth Circuit's standard were accepted, every age discrimination verdict for plaintiff would include an award of punitive damages. To show intentional age discrimination, the plaintiff must show that age was an intentional motivating factor in his termination, *i.e.*, that decision-makers were motivated by age animus. Evidence of age animus by decision-makers, whether direct or circumstantial, is by definition "discriminatory conduct." Yet according to the Eighth Circuit, "discriminatory conduct" by decision-makers is "outrageous." Thus, under the Eighth Circuit's decision, intentional age discrimination by itself constitutes outrageous conduct which justifies punitive damages. This conclusion violates the Due Process Clause and the decisions of this Court.

Other circuits have correctly held that evidence of intentional discrimination that is sufficient to support a compensatory damages award in an employment discrimination case may not establish a basis for liquidated or punitive damages.[3] *Equal Employment Opportunity Comm'n v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992 (9th Cir. 1998) (Title VII plaintiff seeking punitive damages must "make a showing beyond the threshold level of intent required for compensatory liability"); *United Mine Workers of America v. Moore*, 717 A.2d 332, 341 (D.C. 1998) (although employer's actions were discriminatory, they were not sufficiently malicious, wanton, reckless or willful to support a punitive damages award). *United States Equal Employment Opportunity Comm'n v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1249 (11th Cir. 1997) (defendant's violation of the ADEA does not, by itself, establish a right to liquidated damages; the plaintiff must establish a violation that was "willful" or in reckless disregard of the ADEA); *Equal Employment Opportunity Comm'n v. Pape Lift, Inc.*, 115 F.3d 676, 682 (9th Cir. 1997) (same); *Molnar v. United Technologies Otis Elevator*, 37 F.3d 335, 337 (7th Cir. 1994) (same); *Purcell v. Seguin State Bank and Trust Co.*, 999 F.2d 950, 955-6 (5th Cir. 1993) (same).

While the jury found discrimination (see point II below), the evidence is insufficient to establish a finding of outrageousness. Farmers documented its concerns regarding Denesha's job performance. Farmers' concerns regarding his work were all material to his responsibilities. Denesha conceded that in many respects Farmers' opinion of his work

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3. Under the ADEA, liquidated damages cannot be awarded solely upon the finding of discrimination. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616 (1993); *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985).

performance was justified. Farmers complied with its personnel policies regarding progressive discipline and discharge. Farmers did not reduce Denesha's wages or benefits while he was an employee. Farmers transferred him to a job which he admitted he could do without further training. This falls far short of conduct that "is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others." *Burnett*, 769 S.W.2d at 787.

The reprehensibility of conduct required for the imposition of punitive damages is an issue of substantial importance that affects thousands of cases. If the Eighth Circuit's opinion is not reversed, employers would be forced to contend with massive punitive damages awards even if, without dispute, the employer's procedures for discipline were followed and the plaintiff admitted that he should have been able to satisfy his employer's job expectations yet failed to do so.

Farmers respectfully submits that, as in *Kolstad*, this Court should grant certiorari in this case to review the important issue of whether punitive damages may be awarded merely upon an inference of discriminatory animus.

II.

THE EIGHTH CIRCUIT'S HOLDING THAT, IN ATTEMPTING TO PROVE THAT THE EMPLOYER INTENTIONALLY DISCRIMINATED AGAINST THE EMPLOYEE, THE EMPLOYEE DID NOT HAVE TO REBUT THE EMPLOYER'S PROFFERED REASON FOR DISCHARGING THE EMPLOYEE BUT COULD RELY UPON EVIDENCE REGARDING THE EMPLOYEE'S TREATMENT "THROUGHOUT THE EMPLOYEE'S TENURE WITH THE COMPANY" IN OTHER JOBS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH DECISIONS OF OTHER CIRCUIT COURTS.

The Age Discrimination in Employment Act ("ADEA") prohibits the discharge of an employee "because of" the employee's age. 29 U.S.C. § 623(a)(1). Where the employer articulates a legitimate non-discriminatory reason for the discharge, the employee cannot establish age discrimination unless the employee proves that the employer's proffered reason is a pretext for intentional discrimination. A "reason cannot be proved to be 'a pretext for *discrimination*' unless it is shown *both* that *the reason* was false, *and* that discrimination was the real reason." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993) (emphasis of "the reason" added); *Ryther v. KARE 11*, 108 F.3d 832, 836-38 (8th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 2510, 138 L. Ed. 2d 1013 (1997) (*Hicks* applies to ADEA claim). Under *Hicks*, the employer's articulated reasons are "the only evidence which the plaintiff must refute." *Id.* at 523. In the pretext phase, the "factual inquiry proceeds to a new level of specificity". *Id.* at 516.

> [P]roving the *employer's reason* false becomes a part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination.

Id. at 517 (Emphasis added).

Farmers' legitimate nondiscriminatory reason for Denesha's discharge was Denesha's poor performance in the entry level OCR job during the last months of his employment. Denesha admitted that, as an OCR, he failed to handle files properly and caused many justified customer complaints. Denesha's argument focused on his allegations that Farmers treated him unfairly as an FCR. The Eighth Circuit ruled that the jury verdict for Denesha was proper because of Denesha's evidence regarding Farmers' treatment of him as a FCR because

> a jury in assessing whether an employer's proffered reasons for the adverse employment action constitute pretext and whether there was intentional discrimination may consider the employer's conduct throughout the employee's tenure with the company.

(App. 12a).

Under the Eighth Circuit's decision, in connection with the discharge of an employee from a job, employers would be completely unable to assure compliance with the ADEA because, regardless of the specific reasons for its decision, the employer would be subject to potential liability because of its treatment of the plaintiff at any time "throughout the employee's tenure with the company". Under the Eighth

Circuit's decision, if the employer discharged an employee for theft, the employee could prove that the discharge constituted discrimination by arguing that the employer had previously in another job required him to produce too much.

The Eighth Circuit's decision conflicts with other circuits' correct decisions that, to prevail on a discharge discrimination claim, the plaintiff must contradict the employer's specific reason for discharge. *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) (plaintiff did not rebut employer's assertion that he was not qualified for position); *Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994) ("plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder to infer that *each* of the employer's proffered non-discriminatory reasons was either a *post hoc* fabrication or otherwise did not motivate the employment action"); *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 732 (4th Cir. 1996) ("[I]f the plaintiff offers nothing to disprove the defendant's nondiscriminatory explanations, the explanations' weakness alone is insufficient to create an issue of pretext."); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1085 (6th Cir. 1994) (directed verdict proper; no evidence directly challenged employer's proffered explanations); *Kariotis v. Navistart Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) ("To successfully challenge the honesty of the company's reasons she must specifically rebut those reasons."); *Sirvidas v. Commonwealth Edison* Co., 60 F.3d 375, 378 (7th Cir. 1995) ("[plaintiff] must specifically refute the facts which allegedly support the employer's claim of deficient performance"); *Trotter v. Board of Trustees*, 91 F.3d 1449, 1457 (11th Cir. 1996) (employer's proffered legitimate, non-discriminatory reasons "remain[ed] unrebutted."); *May v. Shuttle, Inc.*, 129 F.3d 165, 170-173 (D.C. Cir. 1998) ("employees failed to rebut employer's proffered reason for furloughs.").

Absent review by this Court, the lower courts will be inundated with litigation unrelated to the specific reasons for an employer's action and businesses will not have any meaningful guidance regarding ADEA compliance. Under the Eighth Circuit's decision that an employee can prove discharge discrimination by evidence regarding his treatment "throughout the employee's tenure with the company", an employee who is discharged for absenteeism from a clerk's job will be entitled to relief because, in a prior job, the employer disciplined her for rudeness to a customer.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEONARD SINGER
Counsel of Record
BIOFF SINGER AND FINUCANE, LLP
104 West Ninth Street
Suite 400
Kansas City, Missouri 64105-1718
(816) 842-8770

CURTIS E. WOODS
SONNENSCHEIN NATH AND ROSENTHAL
4520 Main Street
Suite 1100
Kansas City, Missouri 64111
(816) 932-4400

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED NOVEMBER 3, 1998

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-4373

Charles Theodore Denesha,

Appellee,

v.

Farmers Insurance Exchange,

Appellant.

No. 97-4374

Charles Theodore Denesha,

Appellant,

v.

Farmers Insurance Exchange,

Appellee.

Appeals from the United States District Court
for the Western District of Missouri.

Appendix A

Submitted: September 24, 1998

Filed: November 3, 1998

Before MCMILLIAN, HEANEY, and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

Charles Theodore Denesha brought this age discrimination suit against Farmers Insurance Exchange (Farmers), his former employer, pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§ 621-634 (West 1998), and the Missouri Human Rights Act (MHRA), Mo. Ann. Stat. § 213.055 (Vernon 1994). Farmers appeals from final judgments entered in the District Court for the Western District of Missouri. A jury awarded Denesha compensatory and liquidated damages under the ADEA and punitive damages under the MHRA. Upon post-trial motions the court granted Denesha further equitable relief in the form of attorneys fees and front pay and granted Farmers' motion for judgment as a matter of law with respect to punitive damages. Farmers appeals from denial of its motions for judgment as a matter of law or in the alternative a new trial on the issues of liability and willfulness under the ADEA, the award of front pay and liquidated damages, and the award of attorneys fees and costs. Denesha cross-appeals on the question of punitive damages and the amount of the front pay award. We affirm in part and reverse in part.

I. BACKGROUND

"We recite the facts in the light most favorable to the jury verdict and the district court's findings." *Newhouse v.*

Appendix A

McCormick & Co., Inc., 110 F.3d 635, 637 (8th Cir. 1997). In October of 1992, Charles Denesha was 55 years old and had been employed by Farmers as a Claims Representative (CR) for seventeen years. Denesha began his career with Farmers in 1975 as an Office Claims Representative ("OCR"), an entry-level office job handling small property claims over the telephone. In 1979, Denesha became a Field Claims Representative ("FCR") handling bodily-injury claims. In November of 1992, the Grandview Branch Claims Office ("BCO"), Denesha's place of work from 1975, merged with the Kansas City BCO. Prior to the merger, Denesha had never been denied a raise[1] or formally disciplined.

In early December 1992, John White, the Branch Claims Manager for the Kansas City BCO, altered the salary review completed by Denesha's former supervisor, Julie Clark.[2] White went beyond the review period in question to find examples of poor quality work in order to justify denying a raise. Prior to the denial of the raise, Denesha had received no negative information regarding his performance. In both his November and December case reviews, however, Denesha's new supervisor, Joe Wilfong, had stated that the "younger employees [are] running circles around the older

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1. From at least 1982, raises at Farmers were based on performance. During the seventeen-year period from 1975 to 1992, Denesha had received consistently positive evaluations under nine different supervisors.

2. Though Joe Wilfong had replaced Clark as Denesha's direct supervisor after the merger, Clark prepared Denesha's 1992 salary review based on her day-to-day supervision of his work through October 1992 and recommended a 4% salary increase.

employees." (Tr. at 1216.) When Denesha complained about the salary decision, Wilfong and White treated him differently from other employees, failing to follow various office procedures. In addition, Denesha was not given leave-time to catch up on files as were other transferees from the Grandview BCO.

In October 1993, Denesha was demoted to an entry-level OCR position, which White had expressed an intention of discontinuing. Despite the demotion, Denesha maintained his FCR files in addition to the new OCR workload that White himself described as "horrendous." Additionally, Wilfong began recording complaints about Denesha without giving verbal warnings, though other employees received verbal warnings before any complaints became part of their permanent record. Notwithstanding White's and Wilfong's determination that Denesha's performance was inadequate, an audit by Farmers' regional office showed that Denesha was doing his job. Purportedly due to consumer complaints, Farmers terminated Denesha's employment in May 1994.

Denesha then brought suit against Farmers, alleging that he was denied a raise and subsequently dismissed because of his age. Farmers contended that Denesha was denied a raise, demoted, and dismissed because of his poor performance. The jury found that Denesha's age was a determining factor in Farmers' decision to deny the raise and to fire him. Pursuant to special verdict forms, the jury determined that Farmers' violation of the ADEA was 'willful,' thereby supporting an award of liquidated damages, and that Farmers' conduct was 'outrageous,' thereby supporting an award of $4 million in punitive damages under the MHRA. The district court set

aside the award of punitive damages and by final order awarded Denesha $102,614 in back pay with liquidated damages in the same amount, $61,666.67 in front pay, and attorneys fees in the amount of $149,906.97. Both parties appeal.

II. DISCUSSION

A. Jury Verdict on Denial of Raise and Subsequent Discharge

The first issue raised on appeal is whether the district court erred in denying Farmers' motion for judgment as a matter of law or, in the alternative, for a new trial on the claim that Denesha's denied raise and subsequent discharge were products of intentional age discrimination. Farmers contends that because Denesha's poor performance was well documented and because it treated him no differently than similarly situated employees, the district court committed clear error by sustaining the jury's verdict. Denesha, for his part, argues that even where the defendant offers a legitimate, nondiscriminatory reason in support of its actions, the plaintiff may prevail by presenting sufficient evidence for a jury to infer the ultimate fact of unlawful discrimination.

This court reviews de novo the denial of a motion for judgment as a matter of law, applying the same standard as the trial court. *See Cross v. Cleaver*, 142 F.3d 1059, 1066 (8th Cir. 1998); *Equal Employment Opportunity Comm'n v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998). The standard of review for sufficiency of proof in an age discrimination suit embraces the fundamental issue of "whether [the plaintiff] produced sufficient evidence to allow a jury reasonably to

find that [the employer] intentionally discriminated against him on the basis of his age." *Newhouse*, 110 F.3d at 639 (quoting *Ryther v. KARE 11*, 108 F.3d 832, 835 (8th Cir.) (en banc), *cert. denied*, __ U.S. __, 117 S. Ct. 2510 (1997) (alteration in original)). "Appellate review of a jury verdict is extremely deferential." *Browning v. President Riverboat Casino*, 139 F.3d 631, 634 (8th Cir. 1998). We will not reverse a jury verdict for insufficient evidence unless "after viewing the evidence in the light most favorable to the verdict, we conclude that no reasonable juror could have returned a verdict for the non-moving party." *Ryther*, 108 F.3d at 836. In reviewing a denial of a motion for judgment as a matter of law, we must (1) consider the evidence in the light most favorable to Denesha, (2) assume that all conflicts were resolved in favor of Denesha, (3) assume as proved all facts that Denesha's evidence tended to prove, (4) give Denesha the benefit of all favorable inferences that may reasonably be drawn from the proved facts, and (5) deny the motion unless all the evidence points one way and is susceptible of no reasonable inferences sustaining Denesha's position. *See Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994); *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 649 (8th Cir. 1990). A motion for a new trial, by contrast, should only be granted if "the jury's verdict were against the great weight of the evidence so as to constitute a miscarriage of justice." *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 656 (8th Cir. 1995). We review the denial of a motion for a new trial for abuse of discretion. *See id.*

The ADEA makes it "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Protection under the ADEA extends to persons age forty and older. 29 U.S.C. § 631. A plaintiff may meet his burden of establishing intentional age discrimination by relying on either direct or indirect evidence. *See Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991) (citation omitted). Analysis under the MHRA follows that of the ADEA. *See Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 646 (8th Cir. 1997); *McMullin v. McRaven*, 882 S.W.2d 772, 774 (Mo. Ct. App. 1994).

Farmers strenuously argues that no reasonable jury could find "*both* that the [employer's proffered] reason [for the action taken against him] was false, *and* that discrimination was the real reason." *Ryther*, 198 F.3d at 838 n.5 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)) (emphases in original). Contrary to defendant's contentions, however, the fact that Farmers can offer legitimate reasons for plaintiff's denial of a salary increase and subsequent dismissal does not automatically entitle it to judgment as a matter of law. While Farmers offers a host of facially benign reasons for denial of the raise and the subsequent events leading up to and including Denesha's discharge, our review indicates that the record likewise amply supports the jury's conclusion that the offered reason were merely a pretext for underlying age discrimination.

Substantial evidence in the record demonstrates that White and Wilfong did in fact judge Denesha's work by criteria different in both kind and quantum from that of other employees. In September 1992, in his last performance evaluation prior to the merger, Denesha received a rating of

"very good." Clark, Denesha's supervisor at the time, recommended him for a program in which FCRs with a demonstrated ability to work without supervision were permitted to operate out of their homes. Clark also recommended a 4% salary increase based on her day-to-day supervision of his work through October of 1992. On December 4, 1992, at a time when Clark was out of the office on vacation, John White altered the performance review completed by Clark and signed both his and Clark's name to the document.[3] While Clark's portion of the evaluation had presented a complimentary picture of Denesha's achievements during 1992, White noted deficiencies in his performance[4] and wrote that "[y]ou need considerable improvement to assist the BCO in meeting it's [sic] service and cost goals." (Pl.'s Ex. 5.) White testified that he assumed Clark would meet with Denesha to explain the performance review, despite the fact that he had not informed her of nor explained the basis for the alterations made to her evaluation. Clark only became aware of the alteration when she received a letter from Denesha. Only Denesha and one other employee,

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3. The review form completed by Clark requires the signature of both a supervisor and a manager. The purpose of obtaining a manager's signature on the review form is to indicate agreement with the supervisor's appraisal.

4. Evidence presented at trial indicates that White also failed to follow company procedure in compiling the negative information. He reviewed files in which the initial work was performed outside the period under immediate review, including one that dated to 1988. Additionally, he did not follow accepted company practices in tabulating the timeliness of Denesha's client contact and in failing to treat contact with a client's attorney, the leaving of business cards at a home address, or contact made by an OCR as full contact.

also over fifty years of age, at the Kansas City BCO were denied raises in 1992.

When questioned in a deposition as to the negative information added to Clark's performance review, White could not identify the source of the complaints. At trial he contended that he, along with other managers, had received complaints about Denesha. However, none of the managers allegedly receiving complaints about Denesha documented them, and Farmers was unable to produce alternative sources of documentation. Neither Wilfong nor Clark, his direct supervisors during 1992, documented any complaints about Denesha prior to the December salary review. Subsequently, White admitted that there was no documentation to support his allegation of complaints.

Prior to being denied a salary increase, Denesha had no indication that his new supervisors were dissatisfied with his work. During his November case review with his new direct supervisor, Joe Wilfong, Denesha was not informed of any complaints. Wilfong did tell Denesha, however, that "younger employees [are] running circles around older employees." (Tr. at 1216.) Wilfong repeated this view during Denesha's December 1992 case review and to another FCR, Vyck Shanes. When Wilfong later told White that "he had used a poor choice of words," White suggested that in the future he use the term "newer" employees instead of "younger." (Tr. at 797-99.) At a meeting in the spring of 1993, White stated that the only way to improve things would be to get rid of the "old heads" around the office.

Other evidence also suggested that White and Wilfong treated Denesha in a disparate manner. For example, Denesha

was placed on progressive discipline in June 1993 even though his performance was comparable to that of other FCRs[5] and despite the fact that he led the office in reduction of bodily injury ("BI") costs. Additionally, Denesha received more assignments than other FCRs. Both White and Wilfong refused to review records Denesha had compiled that showed his caseload to be significantly higher than other FCRs.[6] White dismissed these complaints as "bogus" and the product of a "chronic complainer." When Wilfong began recording complaints in January 1993, he told Denesha that he was recording complaints received about all employees and that he should not let it bother him. The younger CRs testified, however, that they received verbal warnings before their

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5. An evaluation of the Kansas City BCO performed on March 22, 1993, indicated that the caseload for the FCRs in that office was unmanageable. The report recommended a "[d]rastic[] reduc[tion in] the case load of the field CRs to a manageable level." While the report did not indicate that any FCR was further behind than any other in processing claims, evidence indicates that Denesha was assigned a substantially greater number of claims in the first five months of 1993 than any of his colleagues.

6. Denesha's caseload difficulties were exacerbated by procedures at the Kansas City BCO pertaining to status reports. The Grandview BCO had operated under a special program in which FCRs were not required to turn in 90-day status reports on their files. Other employees who transferred from the Grandview BCO were taken off assignments so that they could catch up with their status reports. While FCRs Shanes and Moody were given from an additional ten months to a year to catch up on their status reports, Wilfong demanded that Denesha bring his up to current by June 14, 1993. Both Moody and Shanes testified on direct that Denesha was treated differently with respect to the status reports.

supervisors recorded complaints made against them. Wilfong also failed to do a field "ride along" with Denesha during the eleven months that he supervised him. The "ride along" is intended to improve the efficiency of CRs, and it is company policy to do a minimum of one per quarter, more if the CR is having problems. White admitted that he would be "shocked" to learn that a supervisor failed to do the "ride along." Wilfong did ride along with other employees and testified at trial that he consciously decided not to follow procedures with Denesha because he did not think it would help him.

After placing Denesha on formal discipline, Wilfong created goals for Denesha that were unattainable as measured by the accomplishments of other employees. Both White and Terry Lee, Farmers' Regional Liability Claims Manager, testified that it would be unreasonable to expect an FCR to settle more than 100 BI units in a month. In August 1994 White wrote to FCR Shanes to congratulate him on settling 158 BI units in a six-month period, and White testified that during the summer of 1993 anything more than thirty units in a month would have been satisfactory. Nonetheless, Denesha would have had to complete over 100 units in July 1993 to achieve the goal Wilfong set for him. This goal was in addition to catching up on all his status reports, a requirement that other CRs were given extra time to achieve.

At a September 1993 meeting, Wilfong told Denesha that his probationary period would end on October 7 and that his performance would be reviewed at that time. During September, Denesha settled the most bodily injury units in the Kansas City BCO. Nonetheless, he was demoted on October 7, 1993 to an entry level OCR position. White

indicated that he did not respect the OCR position and that he did not intend to continue it. In addition to handling property damage claims and subrogation files as an OCR, Denesha continued to handle most of his remaining bodily injury files. On November 15, 1993, the subrogation and bodily injury files were taken away from Denesha, and on November 24, 1993, he again was placed on formal discipline. White characterized the workload at the Kansas City BCO during this entire time period as "horrendous." Nonetheless, a regional auditor observed in March of 1994 that Denesha had made 24-hour contact with claimants 100% of the time. This finding conflicted with the claims of White and Wilfong, who characterized Denesha as consistently below the required 90% goal for 24-hour contact. These facts support the jury's conclusion that Farmers' actions were the product of discriminatory animus with respect to Denesha's age.

Farmers next argues that regardless of what happened during Denesha's tenure as an FCR, the company cannot be held liable for discharging Denesha based on his work performance as an OCR. Farmers would have us treat each alleged discriminatory act as an isolated event to be kept distinct from each other unlawful act. Such an argument finds no support in our precedent. The district court correctly stated that a jury in assessing whether an employer's proffered reasons for the adverse employment action constitute pretext and whether there was intentional discrimination may consider the employer's conduct throughout the employee's tenure with the company. *See Denesha*, 976 F. Supp. at 1285 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)); *see also Hindman v. Transkrit Corp.*, 145 F.3d 986, 993 n.26 (8th Cir. 1998) (three-year-old statements, even

if not themselves actionable, may be relevant as background evidence in proving ultimate issue of age discrimination); *Hardin v. Hussman Corp.*, 45 F.3d 262, 266 (8th Cir. 1995) (statements remote in time can be used to meet "additional showing" requirement); *Clements v. General Accident Ins. Co.*, 821 F.2d 489, 492 (8th Cir. 1987) (statements remote in time relevant to showing of general intent or inclination to discriminate). Farmers' argument that Denesha could not create an inference of discrimination by raising issues stemming from his work as an FCR confuses relevance with direct causation. *See Neufeld v. Searle Lab.*, 884 F.2d 335, 340 (8th Cir. 1989).

Here, however, Denesha was not limited to using the statements as background evidence. It is well settled that a plaintiff can meet his burden of proving intentional discrimination by providing evidence of remarks by decision makers reflecting a discriminatory attitude. *See White v. Honeywell*, 141 F.3d 1270, 1275-76 (8th Cir. 1998); *Madel v. FCI Marketing, Inc.*, 116 F.3d 1247, 1252 (8th Cir. 1997); *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991). While it is true that prior evaluations establishing competent performance "do not render more recent negative evaluations inherently untrustworthy," *Rose-Maston v. NME Hospitals, Inc.*, 1998 WL 11051, at *4 (8th Cir. 1998), direct evidence of discriminatory animus on the part of decision makers is relevant not only to the issue of pretext but may itself form the basis for a finding of intentional discrimination. *See Madel v. FCI Marketing, Inc.*, 116 F.3d 1247, 1252 (8th Cir. 1997) (use of age-based epithets by sales manager sufficient to constitute evidence of discriminatory intent); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 728 (8th Cir. 1992)

(comment of shop foreman asking supervisor why he had an "old man carrying the boxes" constitutes direct evidence in support of jury's finding of pretext).

Both Wilfong's statements that the "younger employees were running circles around the older employees" and White's assertions that the office needed to rid itself of "old heads" occurred contemporaneously with events that form the basis of this litigation. Wilfong made his statements on several occasions near the time that Farmers denied Denesha's raise in December 1992. White made his statements in June 1993, at approximately the same time that plaintiff was placed on formal warning after White characterized him as a "chronic complainer" due to his attempts to receive a workload comparable to other employees. "As the Supreme Court has noted, '[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.' " *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727, 733-34 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). A reasonable jury could conclude from these facts that White and Wilfong's decisions regarding Denesha were informed by a discriminatory animus and that their workload and disciplinary decisions concerning Denesha were designed to elicit failure.

Similarly, Farmers' effort to characterize the comments of White and Wilfong as "stray remarks," "statements by nondecisionmakers," or "statements by decision makers unrelated to the decisional process" lacks persuasive force. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring); *see also Beshears v. Asbill*, 930

F.2d 1348, 1354 (8th Cir. 1991) (adopting O'Connor's distinction between comments that demonstrate a discriminatory animus and stray or nondecisional remarks). Because Wilfong's and White's remarks concerning the performance of older employees were made during the same period as their decisions impacting Denesha's workload and job security, "[a] reasonable person could infer . . . that [the ultimate decision] to terminate [p]laintiff[] was based on age." *Madel*, 116 F.3d at 1252.

Farmers next argues that the record lacks substantial evidence establishing that its reasons for denying Denesha's 1992 raise rose to the level of intentional age discrimination. We disagree. To make his prima facie case, Denesha was required to show that he was a member of a protected group, he qualified for the raise, despite qualifying he was denied the raise, and other employees of similar qualifications who were not members of the protected group in fact received raises. *See Winbush v. State of Iowa*, 66 F.3d 1471, 1479 n.13 (8th Cir. 1995). Denesha was over forty, his supervisor submitted a highly complimentary review that was later altered by his manager on the basis of irrelevant and perhaps contrived information, he was denied the raise, and all other employees except one other individual over the age of fifty received raises. This showing, coupled with direct evidence of White's discriminatory bias, amply supported the jury's determination that the denial of Denesha's 1992 raise was due to intentional age discrimination. *See id.* at 1479.

B. Damages

The court awarded Denesha $416,801.64 in overall damages, comprised of $102,614 each in compensatory and

liquidated damages, $61,666.67 in front pay, and $149,906.97 in attorneys fees and expenses. Farmers challenges the award of attorneys fees and front pay.[7] Denesha on cross-appeal challenges the district court's calculation of front pay and revocation of punitive damages.

1. Award of Attorneys Fees

Due to its unique understanding of and exposure to proceedings before it, the district court retains discretion in determining attorneys fees. *See Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349, 358 (8th Cir. 1997). The district court awarded plaintiff's lead trial attorneys $170 per hour in fees. Farmers complains that this is an unreasonable award as it is considerably higher than the rate charged by Farmers' own counsel. The record indicates, however, that the charges are consistent with rates in the Kansas City market, and that the fees charged by Farmers' attorneys are below market rate. *See Denesha*, 976 F. Supp. at 1290-91; *see also Roche v. City of Normandy*, 566 F. Supp. 37, 41 (E.D. Mo. 1983) (customary hourly charge is one factor to be considered in calculating fees). The record also indicates that the district court carefully reviewed the statements and billings of Denesha's attorneys, even in one instance eliminating apparently unrelated charges. Given the care with which the court apparently considered the issue, we find no indication of abuse of discretion.

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7. Our determination *supra* to reinstate punitive damages obviates any need, at least on the facts of this case, of addressing liquidated damages. *Cf. Nelson*, 26 F.3d at 803 n.1.

2. Award of Front Pay

Farmers challenges the award of front pay. On cross-appeal, Denesha argues that the district court abused its discretion in reducing the award for front pay based on a finding of failure to mitigate damages. We affirm the district court.

Under the ADEA the district court must tailor its remedy to make the injured party whole. *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065 (8th Cir. 1988). Front pay is an equitable remedy that in limited circumstances may be awarded in lieu of reinstatement, as where there is such hostility between the parties that "a productive and amicable working relationship would be impossible."[8] *Id.* (quoting *EEOC. v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir.); *see also Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 730 (8th Cir. 1992). The amount of front pay is an equitable matter to be determined by the court. *See Newhouse*, 110 F.3d at 642-43. In calculating front pay, the court has "the discretion to consider all the circumstances involved in determining appropriate equitable relief." *Curtis v. Electronics & Space Corp.*, 113 F.3d 1498, 1504 (8th Cir. 1997). We review for abuse of discretion. *Id.*

"A successful ADEA plaintiff must show that he or she attempted to mitigate damages or face a reduction in the

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8. The district court noted that plaintiff does not actively seek reinstatement and defendant does not "seriously suggest" that reinstatement would be appropriate. The court also found that given the level of animosity between the parties, reinstatement would not be an appropriate remedy. We agree with this determination.

damage award." *Newhouse*, 110 F.3d at 641. This duty requires that the plaintiff use reasonable diligence in finding suitable employment and not refuse a position substantially equivalent to the one at issue. *See id.* (citations omitted). The defendant bears the burden of showing that there were suitable positions and that the plaintiff failed to use reasonable care in seeking them. *See Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1106 (8th Cir. 1996).

For a period of six months following plaintiff's dismissal in May 1994 he attempted without success to find a job in the insurance industry. After six months, Denesha determined that he needed to replace his lost income and obtained part-time employment demonstrating magic toys at a toy store and as a substitute teacher. Denesha did not apply for another job in the insurance industry until two weeks before the front-pay hearing in September 1997. Thus, over a period of thirty-three months, during which he was employed part-time, Denesha made only a single application for employment in his area of expertise. At the front-pay hearing, the district court found credible the expert evidence presented by Farmers that there were a number of different positions that Denesha could have tried to obtain.[9] While the requirement of mitigating damages "is not onerous and does not require success," *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065 (8th Cir. 1988), the duty does require that the plaintiff exercise reasonable diligence, *see Newhouse*, 110

9. While an unemployed litigant need not "go into another line of work, accept a demotion, or take a demeaning position," *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982), he also may not abandon his efforts "in the face of his difficulties," *Payne v. Security Sav. & Loan Ass'n F.A.*, 924 F.2d 109, 111 (7th Cir. 1991).

F.3d at 641. We sympathize with the frustrations faced by a plaintiff in his late fifties seeking work at a level comparable to his previous position with defendant. We cannot conclude, however, that the district court abused its discretion by finding that Denesha failed to make an "honest, good faith effort" to minimize his damages by obtaining full-time employment. *Brooks*, 852 F.2d at 1065; *see also Payne*, 924 F.2d at 111. Though attempts to find work do not have to rise to the level of ambition exhibited by the plaintiff in *Brooks*, a plaintiff must make some sustained minimal attempt to obtain comparable employment. *See* 852 F.2d at 1065. Denesha failed to make such an attempt. We therefore agree with the district court that an amount equal to what Denesha would have earned if he had made reasonable mitigation efforts was properly subtracted from his award. *See Cassino v. Reichold Chems., Inc.*, 817 F.2d 1338, 1345 (9th Cir. 1987).

3. Punitive Damages

Denesha argues that the district court erred by granting Farmers' motion for judgment as a matter of law as to the jury's award under the MHRA of $4 million in punitive damages. While we conclude that $4 million constitutes an excessive award on these facts, we agree with Denesha that a reasonable juror could determine that Farmers' actions support punitive damages.

The district court can set aside the jury's verdict only if, upon viewing the evidence in a light most favorable to the prevailing party, it concludes that no reasonable juror could have returned a verdict in favor of the nonmoving party. *See Ricketts v. City of Columbia*, 36 F.3d 775, 778 (8th Cir. 1994). We apply the same standard that governed the district court. *See id.* In granting judgment as a matter of law in favor of

Farmers, the district court noted that "[t]he issue of liability was extremely close — another jury could have found that age was not the determining factor in defendant's decision to terminate plaintiff." 976 F. Supp. at 1288. While both sides may have presented strong cases, the correct standard in reviewing a jury's verdict is to consider the evidence in the light most favorable to the plaintiff, *see Ricketts*, 36 F.3d at 778, not what might have been, *see Ryther*, 108 F.3d at 845 (quoting *Forbes v. Arkansas Educ. Television Comm.*, 93 F.3d 497, 501 (8th Cir. 1996), *rev'd on different grounds*, 118 S. Ct. 1633 (1998)) ("We do not know what our answer would have been if we had been sitting on the jury, but that is not important. There was conflicting evidence on this issue, and it could have gone either way. Making decisions of this kind is exactly what juries are for."). Considering the facts in a light most favorable to Denesha, we cannot agree that no reasonable juror would be able to render a verdict for Denesha on the issue of punitive damages.[10]

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10. In addition, the cases relied upon by the district court in determining that punitive damages were inappropriate are not as factually analogous to the instant case as are other recent decisions. Neither *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796 (8th Cir. 1994), or *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 396 (8th Cir. 1992), involved any direct evidence of discrimination by key decision makers. By contrast, in *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575-76 (8th Cir. 1997), the court upheld an award of punitive damages where a company ignored complaints and failed to follow policy in response to verbal sexual harassment. Similarly, in *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8th Cir. 1992), the court awarded punitive damages where a supervisor had disciplined a female employee more harshly than a male employee. *See also Varner v. National Super Mkts., Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996) (denying punitive damage where no decision makers participated in the illegal conduct).

Under Missouri law, " '[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others.' " *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. 1989) (en banc) (quoting *Restatement (Second) of Torts* § 908(2) (1979)). Unlike the willfulness standard for liquidated damages specified under the ADEA, *see Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1708-10 (1993), punitive damages issue under the MHRA only upon a finding of some element of outrage, *see Burnett*, 769 S.W.2d at 789. "The requisite level of recklessness or outrageousness can be inferred from management's participation in the discriminatory conduct." *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575 (8th Cir. 1997).

The twin policy objectives of punitive damages are punishment and deterrence. *See EEOC v. HBE Corp.*, 135 F.3d 543, 556 (8th Cir. 1998) (citing *Call v. Heard*, 925 S.W.2d 840, 848 (Mo. 1996) (citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991))). The amount of punitive damages awarded under the MHRA should reflect this purpose of punishment and deterrence, taking into account additional factors such as the severity of the defendant's misconduct, the presence of aggravating or mitigating factors, and the financial situation of the defendant. *See HBE Corp.*, 135 F.3d at 556 (citing *Call*, 925 S.W.2d at 848-49 (citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)). Considering the evidence in the light most favorable to Denesha, there was sufficient evidence of outrageousness to permit a reasonable juror to award punitive damages.[11] As in

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11. The parties do not contest the jury instructions as to the issue of punitive damages.

Kimzey, management participated directly in the discriminatory conduct. *See* 107 F.3d at 575. Wilfong, Denesha's direct supervisor, on several occasions stated that the work of older employees was inferior to younger employees. Though these statements were brought to the attention of White, the office manager, he failed to take the matter seriously, instead advising Wilfong to use different language in the future. In addition, Farmers failed to address EEOC complaints filed by Denesha in January 1993 following a meeting between himself and the head of the personnel department regarding the denial of a raise and again in May 1993 after White refused to examine statistics showing that his workload was unfair, despite an audit of the statistics used by Wilfong contradicting his perception of plaintiff's performance. There was also evidence to support a determination that White and Wilfong held older employees to different standards than younger employees. Deliberately restricting opportunities and rewards based on age is a violation of the law. It is precisely these type of attitudes and actions that punitive damages are designed to deter. In sum, the actions of White and Wilfong permit an inference of discriminatory animus on the part of key decision makers, thus establishing the quantum of outrageousness necessary to support an award of punitive damages. *See Kimzey*, 107 F.3d at 575.

Having concluded that punitive damages are appropriate, we turn to the question of whether the $4 million award exceeded what was fair and reasonable. Though the MHRA does not place a cap on damages, $4 million exceeds other awards upheld under Missouri law. *See HBE Corp.*, 135 F.3d at 556-57. Missouri law provides for remittitur when a jury's

punitive damages award exceeds what is fair and reasonable, *see* Mo. Ann. Stat. § 537.068(b) (West 1998), thus permitting the court to potentially obviate further consumption of judicial resources by giving the plaintiff a choice between a new trial and an award, *see Hetzel v. Prince William County*, 118 S. Ct. 1210, 1211-12 (1998) (holding that the practice of granting remittitur without giving the plaintiff the option of a new trial 'cannot be squared with the Seventh Amendment'). While there is no precise mathematical formula for determining punitive damages, *see Finley v. Empiregas, Inc.*, 975 F.2d 467, 472 (8th Cir. 1992); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991), considerations of due process, relation to prior awards under Missouri law, and the nature and extent of the plaintiff's injuries convince us that remittitur in the amount of $700,000 more properly vindicates the policy objectives at issue. *See Call*, 925 S.W.2d at 848-49 (stating that a nonexhaustive list of considerations in assessing award of punitive damages includes severity of misconduct, aggravating or mitigating circumstances, and finances of the defendant); *Moore v. Missouri-Nebraska Express, Inc.* 892 S.W.2d 696, 713-14 (Mo. App. W.D. 1994) (applying same factors in determining proper amount of remittitur).

As an initial matter, the 24:1 ratio of punitive to compensatory damages is not unsettling as a matter of due process. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581-86 (1996) (striking a 500:1 punitive damages award as violative of the Due Process Clause of the Fourteenth Amendment). *Cf. id.* at 581-82 (citing *Haslip*, which described a 4:1 punitive to compensatory ratio as close to the line, but emphatically rejecting any categorical approach);

Kimzey, 107 F.3d 577-78 (reducing punitive damages from a 100:1 to a 10:1 punitive to compensatory ratio). Similarly, the ratio of punitive damages to net worth is not unduly low when calculated according to Farmers' surplus. *See HBE Corp.*, 135 F.3d at 556 (describing a punitive award of five percent of the corporation's net worth as "very high"). Farmers' surplus — the insurance industry equivalent to net worth — was $1.64 billion at the time of trial. However, state regulations require the company to retain a minimum surplus of $1.5 billion. Denesha concedes that when characterizing the remaining $140 million in "excess surplus" as "net worth," which would yield a punitive damages award equal to 3 ½ percent of net worth upon the jury's award, may result in an excessive award under the approach taken in *HBE Corp.* In order to avoid the question of whether this constitutes an unreasonable award, Denesha would have us reduce the award to an amount equal to one-half of one percent of Farmers' net worth, understood in terms of excess surplus. While we follow the Supreme Court in rejecting this or any other categorical approach to determining punitive damages, *see BMW*, 571 U.S. at 581-82, we agree that $700,000 — the product of this calculus — represents an appropriate award under the circumstances.

Consideration of "the nature and extent of the misconduct, [and] the impact on the individual plaintiff[]," reinforces our conviction that a $4 million verdict is excessive. *See HBE Corp.*, 135 F.3d at 556. Farmers' management altered Denesha's salary review, relying on undocumented and uncorroborated complaints to justify denial of a raise and contemporaneously expressed the opinion that the performance of older workers was inferior.

Subsequently, the same management also ignored EEOC complaints and treated Denesha in a manner different from that enjoyed by younger employees. While reiterating that the goal of punitive damages is to punish Farmers and create a disincentive against recidivism, we conclude that the nature and extent of the conduct does not support the jury's award. Keeping sight of those same objectives, we also conclude that the effect on Denesha does not warrant an award of $4 million. Though the record indicates an expected strong emotional response on Denesha's part to being denied a raise and ultimately fired, the harm suffered by plaintiff is more than adequately offset by the combined awards of compensatory and remitted punitive damages. Finally, remittitur in the amount of $700,000 also brings the award in line with our prior decisions. *See Kientzy*, 990 F.2d at 1062 ($400,000 award affirmed); *HBE Corp.* 135 F.3d at 557 (reducing award from $4.8 million to $480,000). Accordingly, we vacate the district court's order on punitive damages and remand for a new trial on that issue only unless Denesha agrees to an award of $700,000.

C. "Willfulness" of ADEA Violation

Farmers contends that the district court committed clear error by sustaining the jury's finding that Farmers violation of the ADEA was "willful." The district court concluded on this basis that plaintiff was entitled to $102,614 in liquidated damages. See 29 U.S.C. § 626(b) (providing for liquidated damages in an amount equal to the compensatory damages awarded by the jury). Denesha apparently conceded before the district court that punitive damages under the MHRA and liquidated damages under the ADEA are mutually exclusive,

while arguing that he was entitled to the greater of the two amounts. *See Denesha*, 976 F. Supp. at 1287. Given our decision to reinstate punitive damages with remittitur of $700,000 — an amount larger than the liquidated damages award — we need not reach the issue of whether defendant's violation was willful." *Cf. Nelson*, 26 F.3d at 803 n.1.

D. Farmers' Motion for a New Trial

Farmers also argues that a new trial is warranted because of error in the jury instructions and in order to prevent a miscarriage of justice. We review the denial of a motion for a new trial for abuse of discretion. *See Nelson*, 26 F.3d at 800. We have considered Farmers' arguments and find no abuse of discretion by the district court. Therefore, the denial of Farmers' motion for a new trial is affirmed.

E. Remaining Issues

We have carefully reviewed the remaining issues raised by the parties and conclude that they are without merit.

III.

For the reasons stated above, we affirm the district court's order denying Farmers' motion for judgment as a matter of law or a new trial and affirm the district court's award of $102,614 in compensatory damages and $61,666.67 in front pay. We also affirm the district court's order with respect to attorneys fees and costs, except insofar as such award fails to reflect Denesha's fees and costs incurred in post-trial arguments on the issue of punitive damages. We reverse,

however, the district court's decision to set aside punitive damages, and remand to the district court with instructions to submit to Denesha remittitur in the amount of $700,000, with the option of a new trial on the issue of punitive damages only, and for further proceedings not inconsistent with this opinion, including recalculation of attorneys fees and costs in light of this decision.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED JULY 28, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 95-0122-CV-W-BD

CHARLES THEODORE DENESHA,

Plaintiff,

vs.

FARMERS INSURANCE EXCHANGE,

Defendant.

ORDER

Following a nine day jury trial, plaintiff's claims pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 626, *et seq.*, and the Missouri Human Rights Act, Chapter 213 R.S.Mo. (MHRA), were submitted to the jury through a series of questions propounded by Verdict Forms A, B and C. On June 20, 1996, the jury returned a verdict in favor of plaintiff Denesha finding that age was a determining factor in defendant Farmers Insurance Exchange's decision to not give plaintiff a salary increase in December 1992 and that the conduct was willful. Punitive damages were not awarded on this claim. (Verdict Forms A and B) The jury also found

that age was a determining factor in defendant's decision to discharge plaintiff and that the conduct was willful. On this claim, the jury awarded punitive damages of four million dollars. (Verdict Forms A and C) The jury awarded plaintiff actual damages of $102,614 for defendant's failure to give plaintiff a salary increase and for defendant's discharge of plaintiff. The jury found in favor of defendant on plaintiff's claim that plaintiff's filing of an EEOC charge was a determining factor in the decision to discharge plaintiff. (Verdict Form A)

Pending before the Court are:

(1) In Response to the Amended Judgment, Defendant's Second Amended Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial or, in the Further Alternative, for Remittitur of Punitive Damage Verdict (doc #111);[1] and

(2) Plaintiff's Motion for Further Equitable Relief and Judgment Under the Age Discrimination in Employment Act and the Missouri Human Rights Act (doc #102).

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1. On July 8, 1996, defendant filed a Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial or, in the Further Alternative, for Remittitur of Punitive Damage Verdict. Later that same day, defendant filed an amended motion. The Clerk's Judgment of June 20, 1996 was amended on June 25, 1996 to include the jury's findings that defendant's actions were willful. The Second Amended Motion was filed in response to the Amended Judgment.

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Extensive briefing has been submitted in support of and in opposition to these motions.

I. *DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW*

In support of its Second Amended Motion for Judgment as a Matter of Law, defendant argues that: (1) plaintiff failed to prove that his age was a determining factor in defendant's decision to deny plaintiff a salary increase; and (2) plaintiff failed to prove that his age was a determining factor in defendant's decision to discharge him.

A. *Applicable Legal Standards*

The parties' briefing reflects a sharp division about what inferences the jury may reasonably draw from the evidence. It is for the jury to draw the inferences from the overall evidence, not the Court. This is particularly true where conflicting inferences may be drawn. Plaintiff must be given the benefit of all reasonable inferences. A reasonable inference is one " 'which may be drawn from the evidence without resort to speculation.' " *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 987 (8th Cir. 1996) (citations omitted).

The court must view the evidence in the light most favorable to plaintiff, the prevailing party. Judgment as a matter of law is only appropriate if all the evidence points one way and is susceptible of no reasonable inference sustaining the non-moving party's position. *See Ricketts v. City of Columbia*, 36 F.3d 775, 778 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1838 (1995). This standard requires the Court to:

> (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Pumps & Power Co. v. Southern States Indus., Inc., 787 F.2d 1252, 1258 (8th Cir. 1986), *cited with approval in Larson v. Miller*, 76 F.3d 1446, 1452 (8th Cir. 1996).

B. *Factual Summary*

Defendant's Second Amended Motion for Judgment as a Matter of Law involves an analysis of a number of factual issues which were disputed throughout the trial. The following is a brief summary of the facts with all factual issues having been resolved in accordance with the standards outlined above.

In October of 1992, plaintiff was 55 years old. He had been employed as a claims representative by Farmers Insurance Exchange for seventeen years. Until he was transferred to the Kansas City Branch Claims Office (hereinafter "KCBCO"), he had never been placed on probation, had never been denied a raise and had never been given a formal warning. (Denesha direct) The Grandview Office was merged with the KCBCO in November 1992. Julie Clark, plaintiff's supervisor at the Grandview office, did not continue as plaintiff's supervisor after the merger. However,

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Ms. Clark prepared plaintiff's initial performance evaluation for 1992.

Office Claims Representatives (OCRs) are entry level positions. OCRs generally have $2,000 or less in authority and work on property damages or theft, not bodily injury claims. (Terry Lee direct) Field Claims Representatives (FCRs) are given automobiles and leave the office to take statements, they can determine liability and they set reserves. (Lee direct) The March 22, 1993 annual evaluation for the KCBCO (Pl. Exh. 175) indicated that the case load for the FCRs in the office was unmanageable.[2] (Lee direct) According to Mr. Lee, the 1993 numbers did not show any one FCR as way behind. The entire office was having a problem meeting the company's goals and deadlines in categories such as ten day reports, status reports, 24-hour contact, etc.

In the last two performance evaluations at the Grandview Office, plaintiff's supervisor, Julie Clark, rated plaintiff as "very good." (Pl. Exhs. 157, 162) In September 1992, during his performance planning with Julie Clark, Ms. Clark told plaintiff that he was in 90% compliance with claims basics and that he was meeting expectations. He was recommended by his supervisor for the Metro claims program.

Plaintiff was not given a raise in 1992. In 1992, at the KCBCO, only plaintiff and Jack Mildfelt, who was two or

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2. One of the recommendations of the report was to "[d]rastically reduce the case load of the field CRs to a manageable level."

three years younger than plaintiff, did not get raises. (John White direct) The written performance evaluation for plaintiff dated December 4, 1992 stated:

> Your last appraisal was conducted in February 1992. Your overall rating was low very good. During 1992 you personally presented two cases to Special Arbitration. Your briefs were thorough and professionally presented. You obtained favorable results on both cases. Our Legal Department complimented you on your handling of negotiations of a litigated case at the pretrial settlement conference. You were able to settle case for $5000 less than our Legal Department had evaluated the case. File reviews indicate that your investigations are incomplete, your direct contact is lacking, 24 hour contact deficient, you generate numerous complaints with your failure to return calls. You need considerable improvement to assist the BCO in meeting it's service and cost goals. Your overall contribution at this time is medium-low.

(Pl. Exh. 5)

The document bears the signatures of Julie Clark and John White. Ms. Clark supervised plaintiff for eleven months of 1992. (Clark direct) When the Grandview and Kansas City offices were merged, Ms. Clark continued to supervise Vyck Shanes, but Joe Wilfong became plaintiff's supervisor. Julie Clark prepared the material in Plaintiff's Exhibit 5 to the sentence beginning "File reviews indicate . . ." Ms. Clark did

not prepare and was not consulted on the remainder of the material in Plaintiff's Exhibit 5 by John White. Ms. Clark recommended plaintiff for a 4% salary increase in 1992; her review was based upon her observations of plaintiff throughout 1992. (Clark direct) Plaintiff wrote Ms. Clark a memorandum asking her about the content of her review. Ms. Clark learned about the changes to plaintiff's 1992 evaluation from plaintiff, not John White.

John White was questioned about where the information in the review concerning complaints came from. At the time of his deposition, he said he thought the information was from the complaint log, although he really did not know. At trial, he testified that he had received complaints as had Mr. Lunn, his supervisor, and Mr. Wilfong. When shown that the complaint logs did not contain any written documentation, Mr. White indicated that he believed written documentation of the complaints during this time existed. Mr. White assumed that Julie Clark would meet with plaintiff and explain the 1992 salary review.

John White acknowledged that Farmers Insurance Exchange's procedures entitle an employee to know why a raise is denied. The procedure manual for Farmers requires that a supervisor meet with an employee to tell the employee why no raise is being given and to give the employee a timetable in which to improve. Mr. White did not meet with plaintiff to discuss his review. At the time that Mr. White modified Julie Clark's appraisal, she was out of the office for one day. Mr. White added the last three sentences on the form and signed Julie Clark's name as well as his. (White direct)

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When Harold Moody reported to the KCBCO from Grandview in October 1992, his status reports were not current. (Moody direct) Upon Mr. Moody's transfer to the KCBCO from Grandview, Randy Funk became Mr. Moody's supervisor. Mr. Funk told Mr. Moody that the volume of cases was greater at the KCBCO and that Moody would be given an opportunity to get his files current according to Kansas City standards. (Moody direct)

Vyck Shanes, a FCR who also transferred to the KCBCO, had a discussion with Joe Wilfong over a disputed expense report in December 1992. At that time, Mr. Wilfong told Mr. Shanes that under the new system, the younger employees were running circles around the older ones. Vyck Shanes was given almost a year to get his files caught up after the move to the Kansas City office. (Shanes direct)

In 1992, Sean Leive was taken off assignments so that he could get caught up. (Wilfong cross) According to Mr. Wilfong, unlike plaintiff, Mr. Leive, who was less than forty years old, only had one problem; however, Mr. Wilfong acknowledged that plaintiff was never taken off assignments so that he could catch up.

In plaintiff's November case review, Mr. Wilfong did not mention any complaints involving plaintiff. In a case review with Joe Wilfong, plaintiff was told that the younger employees were running circles around the older employees. (Denesha direct) Plaintiff testified that Mr. Wilfong said this more than once. (Denesha direct) In connection with this discussion, Mr. Wilfong told John White that plaintiff had misinterpreted something he said. Mr. Wilfong acknowledged

that he used the terms older and younger, but only in connection with the employees' time with the company. Mr. White told Mr. Wilfong that he should have used the words newer rather than younger. (John White direct)

In September 1992, Tammy Constance, then in her thirties, was placed on progressive discipline for failing to return phone calls and for falsifying investigative records for the second time in less than nine months. During 1991, Ms. Constance received four insurance department complaints and allowed two files to go into default. In December 1992, Mr. Wilfong wrote Ms. Constance that she had brought her performance up to acceptable levels. He concluded that 15 out of 15 ten-day reports were on time, most ten-day reports were complete as to investigation, there were no blank recordings, the AIR's were more timely and there were no complaints about unreturned phone calls. (Pl Exh. 379) The Ten Day Report Review for November 1992 also showed that Ms. Constance's other numbers were: 24 Hour Contact — 33.3%; 24 Hour Direct Contact — 26.7%; and No Direct Contact — 20%. (Pl. Exh. 409) These numbers were deemed sufficient by Mr. Wilfong to take Ms. Constance off formal warning.

In June 1993, plaintiff was placed on progressive discipline for failing to meet the 90% goals. Although management claimed that Denesha was last in all categories, plaintiff led the office in the reduction of bodily injury ("BI") costs. None of the other claims representatives in the entire office met all of the 90% goals, but only the oldest FCR was placed on progressive discipline.

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Plaintiff contended that he received more assignments than anyone else. John White refused to review the records compiled by plaintiff which plaintiff claimed showed he had received an unfair number of assignments. Mr. White felt that plaintiff's documents were "bogus" and that he was a chronic complainer. (White direct) Similarly, Mr. Wilfong would not look at the numbers which plaintiff contended showed he was receiving more than his share of the assignments. From January through June 1993, plaintiff was assigned 300 BI units compared to 233 for Tammy Constance and 226 for Sean Leive. (Pl. Exh. 286) As of June 7, 1993, plaintiff received 16.8 units per week compared to 14.7 for Ms. Constance and 13.4 for Mr. Leive. (Pl. Exh. 353)

In January 1993, Mr. Wilfong began recording all complaints received against plaintiff. Younger FCRs received several verbal notices before Mr. Wilfong started writing them down.

Supervisors are required to conduct field rides with claims representatives they are supervising at least once each quarter. Mr. Wilfong's evaluation indicated that he had ridden with each claims representative each quarter. Mr. White assumed that he got this information from Mr. Wilfong; he did not look at the claims representatives' folders to make sure this had happened.

Riding with a claims representative is done as a tool to improve their efficiency. If a claims representative is having problems, it may be advisable to ride with them more than the minimum number of times required. Mr. White admitted that he would be shocked to learn that a branch claims

supervisor supposedly experiencing performance problems with a FCR had failed to ride with that FCR the minimum of one time per quarter. Mr. Wilfong did not ride with plaintiff a single time during the eleven months he supervised him. Mr. Wilfong rode with Tammy Constance once per quarter as required by the procedures.

In March 1993, during a case review, plaintiff asked if he was doing the job and Mr. Wilfong said yes. Plaintiff wrote a memo to Mr. Wilfong on March 19, 1993 confirming this statement. (Pl. Exh. 15) In response, Mr. Wilfong wrote plaintiff asking the point of the letter. Mr. Wilfong further wrote that plaintiff was confused, that plaintiff should take better notes and that in the future, plaintiff should record their conversations so that he could listen to the tape and not rely on his memory. (Pl. Exh. 17) In a June meeting to which plaintiff brought a tape recorder, Mr. Wilfong put a file on top of the recorder and broke it.

On June 28, 1993, plaintiff was placed on formal warning. (Pl. Exh. 18). During an interim meeting in September, plaintiff was told that his probation would end on October 7, 1993 and that his performance would be reviewed at that time. Plaintiff did not complete his probation. (*See* Pl. Exh. 22) Plaintiff was commended for improving in particular areas, but was told that the problems outweighed the improvement. Mr. Wilfong admitted plaintiff had improved and that he had met five of the eight goals set for him. A handwritten note in September 1993 states that plaintiff's biggest problem was that he was not following up and settling claims. (White direct; Pl. Ex. 280) Plaintiff's Exhibit 12 shows that plaintiff settled the most BI units in September 1993.

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Plaintiff was demoted on October 11, 1993 to an entry level OCR position. An OCR handles property damage claims by phone from the office. In addition to handling property damage claims, plaintiff was to oversee 800 to 1,000 subrogation files. Additionally, while some of plaintiff's BI files were initially reassigned, plaintiff continued to handle the bulk of the BI files, approximately 165 files. Plaintiff was told there was a possibility he would return to the field some day. On November 15, 1993, the subrogation and BI files were taken away from plaintiff and reassigned. On November 24, 1993, plaintiff was placed on formal warning. (Wilfong cross-examination)

During this time period, Mr. White characterized the workload as horrendous. Right around the time period that plaintiff was demoted to OCR, Mr. White was taking steps to make the workload of FCRs more manageable. Mr. White did not like the OCR position and did not intend to continue that position. After plaintiff was dismissed, the office was run without an OCR until a few months before trial. (Wilfong cross-examination)

In March 1994, a regional office auditor observed that plaintiff had 100% of the time made 24-hour contact. However, Mr. Wilfong showed plaintiff making less than the goal of 90% of 24-hour contact for that same time period.

Terry Lee, a former Farmers Insurance Exchange employee, testified that in May or June of 1993, he sat by John White at a meeting. At that time, Mr. White advised him that the only way things would get better would be if he could get rid of the "old heads."

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C. *Prima Facia Case*

Defendant argues that plaintiff failed to establish a prima facia case that his age was a determining factor in defendant's decisions to not give plaintiff a salary increase in 1992 and to discharge plaintiff in 1994 because plaintiff cannot establish that his job performance met defendant's expectations or that he was adequately performing his job. (Defendant's Memorandum at 3, 10) Further, defendant argues that plaintiff cannot establish that he was replaced by a younger individual.

Plaintiff may make a prima facia case of discrimination using the method of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As refined by the Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), plaintiff is entitled to an inference of discrimination if plaintiff can establish: (1) he was in a protected age group; (2) he met the applicable job qualifications or was satisfactorily performing his job; (3) he was discharged; and (4) after his discharge, the position remained open and his employer sought applicants with similar qualifications to fill the position. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 776 (8th Cir. 1995).[3]

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3. Using this method of proof, plaintiff's presentation of a prima facie case creates a legal presumption of unlawful discrimination. This presumption places an obligation upon the employer to produce evidence of a legitimate, nondiscriminatory reason for the plaintiff's discharge. If the employer carries this burden, the legal presumption of unlawful discrimination "drops out of the picture." *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

However, plaintiff may always attempt to demonstrate a prima facia case by direct evidence of discrimination. *See Hutson v. McDonnell Douglas Corp.*, 63 F. 3d 771, 776 (8th Cir. 1995). As the Eighth Circuit explained in *Perry v. Kunz*, 878 F.2d 1056 (8th Cir. 1989):

> the trial court failed to recognize that an ADEA plaintiff is not required to prove a prima facie case utilizing only the so-called *McDonnell Douglas* method of proof, but may attempt to utilize either that indirect method of proof or may attempt to prove that age was a determining factor in defendant's decision to terminate her utilizing direct evidence.

Perry, 878 F.2d at 1058.

In *Perry*, the Eighth Circuit reversed the district court's grant of summary judgment in the employer's favor. The district court had concluded that the plaintiff could not establish a prima facia case using the *McDonnell Douglas* analysis because she could not establish that she performed her job at a level that met her employer's expectations.[4] However, there was evidence that the plaintiff's supervisors had said they had to let someone go, that the plaintiff was "up in age" and should go home and that they were doing her

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4. A Personnel Advisory Board had concluded that the plaintiff was incompetent, inadequate, careless or inefficient in the performance of her work duties and that she failed to meet the minimum standards required of her job. *See Perry*, 878 F.2d at 1058. The district court found that plaintiff was collaterally estopped from relitigating this issue.

a favor by letting her go home. *Perry*, 878 F.2d at 1060-61. This testimony, plus evidence that the plaintiff had received good work performance evaluations for most of her twenty-year employment, entitled the plaintiff to have this issue submitted to the jury. *Id.* at 1061. As the Eighth Circuit explained:

> If the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. Defendant cannot refute this evidence by mere articulation of other reasons; the legal standard changes dramatically: "Once an [illegal] motive is proved to have been a significant or substantial factor in an employment decision, defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor."

Id. at 1061-62 (citations omitted).

Thus, defendant is not entitled to judgment as a matter of law on the basis that plaintiff could not make a prima facia case of age discrimination.

D. *Intentional Discrimination*

Defendant argues that plaintiff failed to prove that his age was a determining factor in defendant's decision to not give plaintiff a salary increase in 1992 and to discharge plaintiff in 1994.

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In support of these arguments, defendant claims that the decision to deny plaintiff a salary increase was made by Mr. White, the Branch Claims Manager, based upon an audit of plaintiff's closed files which were randomly selected. Defendant claims that Mr. White used the same factors to assess the performance of Harold Moody and Vyck Shanes who were younger than plaintiff.

Defendant also argues that it had the right to discharge plaintiff based upon his work as an OCR. Defendant claims that plaintiff failed to prove that as an OCR his work was as good as the other OCRs, Jack Dunlap and Pat Leonard. (Defendant's Memorandum at 12-13) Moreover, defendant points out that the work standards applied to plaintiff were job related, the work load was manageable, and his work was poor. According to defendant, plaintiff did not attend to his files, did not contact "A" and "B" parties as expected and caused a huge number of consumer complaints. (Defendant's Memorandum at 10-13)

Contrary to defendant's assertion, the fact that defendant has offered legitimate reasons for plaintiff's failure to receive a salary increase and for his dismissal does not automatically entitle defendant to judgment as a matter of law. Even when the employer produces a nondiscriminatory reason for its actions, the elements of the prima facie case, or in this case direct evidence of discrimination, if accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, may permit the jury to find for the plaintiff. *See Ryther v. KARE 11*, 108 F.3d 832, 837 (8th Cir.), *cert. denied*, 1997 WL 181004 (June 27, 1997).

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Defendant's version of the reasons for plaintiff's discharge was presented by various defense witnesses such as John White and Joe Wilfong and is summarized in various documents. (*See, e.g.*, Def. Exhs. 86, 90, 254) As set forth by defendant, on May 9, 1994, Joe Wilfong wrote to John White recommending that plaintiff be terminated. In this memorandum, Mr. Wilfong references a closed file audit in which plaintiff met only one goal and came close to only two others. Mr. Wilfong also noted that plaintiff had a "very high number of justified complaints" and an attitude "which to sum up is very negative." (Def. Exh. 254) Mr. White forwarded Mr. Wilfong's memorandum along with his own recommendation that plaintiff be terminated to Larry Lunn, Regional Claims Manager. Mr. White concurred in Mr. Wilfong's recommendation and requested authorization to terminate plaintiff. (Def. Exh. 254) According to Mr. White, plaintiff was "currently only meeting one goal and for the most part his performance has deteriorated during the current probationary period. His attitude is definitely a problem as he seems to have lost all interest." (Def. Exh. 254)

Defendant stresses that plaintiff has not attempted to refute and cannot refute the consumer complaints and other statistics pulled from the case files on which defendant claims to have relied in terminating plaintiff. Moreover, defendant contends that the legitimate, nondiscriminatory reasons for plaintiff's discharge pertained to his work as an OCR. Thus, defendant argues that its treatment of plaintiff as a FCR cannot tend to prove age discrimination against him in connection with his discharge from the OCR job.

Contrary to defendant's arguments, defendant's conduct throughout the course of plaintiff's employment with the

company may be analyzed by a jury in assessing whether the proffered reasons for the adverse employment action constitute pretext and whether there was intentional discrimination. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973), the Court noted that "evidence that may be relevant to any showing of pretext includes facts as to the [employer's] treatment of [plaintiff] during his prior term of employment." Here, the individuals who recommended and sought permission to terminate plaintiff, Mr. Wilfong and Mr. White, were the same supervisors whom the jury was entitled to conclude had made age based comments and had treated plaintiff more harshly as a FCR than other younger individuals.

1. *Comments Of Mr. Wilfong*

Defendant contends that because there was no evidence that Mr. Wilfong treated any similarly situated younger person differently than he treated plaintiff, Mr. Wilfong's alleged comments cannot prove discrimination. (Defendant's Memorandum at 26) Further, defendant argues that Mr. Wilfong's comments were made seventeen months before plaintiff's discharge, that they have no connection to the discharge and that they were the comments of a non-decisionmaker. (Defendant's Memorandum at 26-27)

The cases cited by defendant do not support its argument that, in the circumstances of this case, the Court cannot consider Mr. Wilfong's comments in determining if sufficient evidence of discriminatory animus was presented. In *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993), one of several cases relied upon by defendant,

the court found that corporate planning documents, authored by an individual who participated in the decision to terminate the plaintiff, which contained statements that the company's strength included "young managers" and that "top and middle managers are mostly young, well educated and results oriented" were evidence of a discriminatory animus.

Defendant urges the Court to characterize Mr. Wilfong's comments as a "stray remark" as was made in *Stokes v. City of Omaha*, 23 F.3d 1362 (8th Cir. 1994). However, in *Stokes*, the "stray remark" was asking the plaintiff his age during his interview. The court concluded that this isolated question, although improper, was not sufficient to support a finding that the plaintiff was not promoted because of his age. *Id.* at 1367. In this case, the comments of Mr. Wilfong were made not only to plaintiff, but to others and cannot be characterized as an isolated question.

Defendant relies on *Frieze v. Boatman's Bank of Belton*, 950 F.2d 538 (8th Cir. 1991), for the proposition that comments which are remote in time to the discriminatory event should not be considered. In *Frieze*, four years before the plaintiff was fired, he had a general discussion with the bank president about their respective goals. The bank president told the plaintiff that he had waited too long to start his effort towards becoming president of a bank and that he would not reach this goal. *Id.* at 541. This remark about the plaintiff's chances of becoming a bank president were considered insufficient to create an inference of discrimination when the plaintiff was terminated four years later for an act of insubordination. In this case, Mr. Wilfong's statements were made to plaintiff and to Vyck Shanes during

a time period in which plaintiff contends Mr. Wilfong engaged in discriminatory evaluations of his work and treated him differently than younger employees he supervised. Thus, Mr. Wilfong's comments cannot be characterized as stray remarks, nor were they remote in time from the alleged discriminatory event.

The comments of Mr. Wilfong are more akin to those discussed in *Neufeld v. Searle Laboratories*, 884 F.2d 335 (8th Cir. 1989). In that case, the plaintiff's supervisor was alleged to have told others that younger sales agents were more productive and more aggressive, that the younger sales agents in Indianapolis were "kicking your ass" and that the Indianapolis district manager had gotten rid of the older people and hired younger people and that he was trying to do that as well. *Id.* at 338. In *Neufeld*, the defendant argued that these statements, if correctly interpreted, are only an exhortation to work harder or that they were merely statements of fact. The court noted that Searle Laboratories had an opportunity to argue its interpretation of the facts to the jury and that it was not up to the court to overturn the jury's harsher but equally plausible interpretation of the statements. *Id.* at 339.

Mr. Wilfong, as the supervisor who recommended plaintiff's termination, was sufficiently associated with the decision making process that his statements are relevant to the issue of intentional discrimination.

2. *Pretext*

Further, in demonstrating pretext, it is not necessary that a plaintiff disprove the factual basis for the employer's stated

reasons for the discharge. As explained in *Nahrebeski v. Cincinnati Milacron Marketing Co.*, 835 F. Supp. 1130 (W.D. Mo. 1993), *appeal dismissed*, 41 F.3d 1221 (1994):

> Thus, as the court reads *Hicks*, a plaintiff may show that an employer's stated reason for a decision is a "pretext for discrimination" either by showing that the stated reason is factually false (e.g., an employee was not late for work, as claimed) or by showing that the stated reason is false in the sense that it was not the real reason for the employer's actions (e.g., the employee was late, but was actually fired because of race, gender, or age). This view is consistent with the broader teaching of Hicks: whether an employer's stated reasons are "true" or "false" is only a secondary inquiry; the paramount question is whether a preponderance of the evidence persuades the trier of fact that the plaintiff has been the victim of unlawful discrimination.

Id. at 1135. Thus, for plaintiff to prevail it is not necessary that plaintiff attempt to show that there were no customer complaints or that plaintiff performed all aspects of claims basics better than Mr. Wilfong's evaluations would indicate.

In addition to meeting his initial burden by direct evidence of discrimination, i.e. evidence of statements by Mr. White and Mr. Wilfong that showed age bias, plaintiff offered evidence that he had not been treated as favorably as other younger FCRs. For example, plaintiff's supervisor failed to

conduct field rides with him as he did with other FCRs and as he was required to do. These field rides were designed so that a supervisor could assist FCRs with any problems they were experiencing in their performance. Younger FCRs were given time off from new assignments to catch up on their work. Further, when plaintiff was first transferred to an OCR position he was left with a significant number of his other files. While these files were ultimately transferred to a FCR for handling, plaintiff was placed on probation just six days after these additional duties were removed from him.

3. *The Employer's Business Judgment*

Defendant contends that if this verdict is allowed to stand:

> employers will be coerced into tolerating employees' irresponsible and unproductive behavior rather than risk an outrageous result . . . . This verdict threatens the viability of all employers and, thereby, the well-being and security of conscientious employees.

(Defendant's Memorandum at 2) Throughout the course of the briefing, defendant has presented this case as involving issues concerning the termination of subpar employees such as: (1) whether an employer may discipline and terminate poor performing employees regardless of their age; (2) whether defendant presented evidence in support of its claim that plaintiff was a poor performing employee; and (3) whether an employee's poor performance can constitute a defense to a prima facia case of age discrimination.

Appendix B

The Eighth Circuit has addressed similar arguments that juries should not be allowed to second-guess an employer's business judgment. While the Eighth Circuit has recognized that the courts have "no business" telling an employer how to make personnel decisions:

> it is the essence of the fact-finder's duty in an age-discrimination case to decide whether the employer's proffered reason for discharge was its actual motivation. An employer cannot use the "objective" nature of its proffered criteria for personnel decisions to insulate itself from skeptical inquiry by the trier of fact.

Neufeld v. Searle Laboratories, 884 F.2d 335, 340 (8th Cir. 1989).

Contrary to defendant's assertion, no one has questioned the right of an employer to discipline and ultimately terminate poor performing employees. The jury was expressly told than an employer has the right to fire someone regardless of age if the decision is based on factors other than the employee's age. Further, the jury was told that even if they found an employment decision was harsh or unreasonable or wrong, it would not be unlawful if age was not a determining factor in the decision. (*See* Jury Instruction Nos. 17, 20)

The issue before this Court is whether there is sufficient evidence from which a jury could find that intentional discrimination and not the reason advanced by the defendant, i.e. poor performance, was the reason for plaintiff's termination.

Appendix B

E. *Willful Violation Of The Act*

Defendant argues that the verdict of willfulness is not supported by any evidence in the record:

> The evidence is that Farmers has a policy against age discrimination, that its managers knew of the age discrimination prohibition and that procedurally, all proper steps were taken, including the approval of higher management at the regional level, to refuse a pay increase for Denesha in December 1992 and, at the home office level, to discharge Denesha in May 1994.

(Defendant's Memorandum at 29) Defendant further argues that if all a plaintiff need prove is that the employer had a policy and knew of the prohibition against age discrimination "willfulness will always be present in the case of a well managed company and the purpose of the ADEA will be negated as employers will have an incentive to not educate its managers about the law." (Defendant's Memorandum at 29)

The ADEA provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. § 626(b). In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128-29 (1985), the Supreme Court held that an employer's violation of the ADEA is "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." The Eighth Circuit has interpreted *Thurston* to mean that if the people making the employment decision know that age

discrimination is unlawful and if there is direct evidence of age-based animus, the trier of fact may properly find that the action was willful. *See Breshears v. Asbill*, 930 F.2d 1348 (8th Cir. 1991).

In this case, both Mr. White and Mr. Wilfong admitted they were aware of the ADEA's requirements and there was direct evidence of discrimination. Defendant is not entitled to judgment as a matter of law on the issue of whether its conduct was willful. Substantial evidence supported the jury's finding on this issue.

F. *Entitlement To Punitive Damages*

Defendant argues that plaintiff is not entitled to an award of punitive damages because defendant's alleged conduct was not outrageous and shocking. Additionally, defendant contends that because the alleged conduct was not part of a pattern of misconduct, the punitive damage verdict is grossly excessive and violated defendant's right to due process. As additional grounds for reducing the punitive damage verdict, defendant also maintains that the punitive damage verdict bears no relationship to any harm to plaintiff, that it violated due process because it exceeded the fines available for similar misconduct and that it grossly exceeded any amount necessary to punish defendant for its conduct. Finally, defendant argues that plaintiff cannot recover both liquidated damages under the ADEA and punitive damages under the Missouri Human Rights Act.

While conceding that plaintiff cannot recover both liquidated and punitive damages, plaintiff contends that he

should receive the greater of the two awards. In all other respects, plaintiff contests the legal rationale advanced by defendant for reducing or eliminating the punitive damage award.

After reviewing all of the evidence presented in light of the most recent Eighth Circuit precedents, the Court concludes that insufficient evidence exists to support a punitive damage award. Accordingly, defendant's motion for judgment as a matter of law is granted as to the punitive damage award.[5]

The Court's conclusion that sufficient evidence of a willful violation existed is not inconsistent with the Court's conclusion that punitive damages are not warranted in this case. As the Eighth Circuit has explained:

> "The standards established by the Missouri Supreme Court for finding punitive damages under the [MHRA] are entirely different" from the standards for imposing liquidated damages under the ADEA. *Doyne v. Union Elec. Co.*, 953 F.2d 447, 450 (8th Cir. 1992). An employer who demonstrates reckless disregard for its compliance with the ADEA does not necessarily act in a manner that is "outrageous," which is necessary for the imposition of punitive damages. Stated another way, the Missouri law of punitive damages

5. Given the Court's finding on this issue, it is unnecessary to address the other challenges to the punitive damage award raised by defendant.

> requires actual outrageousness, which is not present in the ADEA's concept of willfulness.

Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796, 804 (8th Cir. 1994).

In *Nelson*, the plaintiff was 61 years old and a 37-year employee of Boatmen's Trust at the time of his termination. He was the oldest of the securities traders and the only person whose position was eliminated. Moreover, he had been told his job was safe and that he would have some input into how the consolidated trading department was set up. He was later told that he would be evaluated and that if he received a low evaluation, he would be given a chance to raise it. Mr. Nelson had received raises for the past five years based on merit and offered testimony of his superior abilities and qualifications as a securities trader. There was evidence that at the time he was told by the senior vice-president, Thomas Darnall, that he would be given an opportunity to correct any problems with his evaluations, Mr. Darnall had already made a decision to terminate him. The court concluded that these facts were not sufficiently outrageous to support an award of punitive damages.

In *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388 (8th Cir. 1992), the evidence at trial demonstrated that the employer retained younger workers, used age as a factor in its layoff decisions and told the plaintiff following his layoff that he would not be considered for a move to another subsidiary because of his age. The Eighth Circuit concluded that there was insufficient evidence to support a punitive damage award noting that not all violations of the Missouri

Human Rights Act automatically entitle a plaintiff to punitive damages. *Id.* at 396.[6]

By contrast, in this case, even viewing the evidence most favorably to plaintiff, it is undisputed that defendant was experiencing performance problems with plaintiff. Months prior to his termination, all case files, except those normally handled by an OCR, had been transferred to others. Plaintiff's salary and benefits were not reduced. At the time of plaintiff's termination, defendant had received a number of complaints concerning plaintiff. The issue of liability was extremely close — another jury could have found that age was not the determining factor in defendant's decision to terminate plaintiff. Such a finding, like the finding of the jury in plaintiff's favor in this case, would have been supported by the evidence and the inferences the jury drew from that evidence.

While it was appropriate for the jury to decide the issue of liability and the jury's decision is supported by the evidence, viewing the facts in the light most favorable to plaintiff, punitive damages require more than a showing that

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6. The Supreme Court vacated and remanded for reconsideration in light of *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). *See Glover v. McDonnell Douglas Corp.*, 510 U.S. 802 (1993). On reconsideration, the Eighth Circuit concluded that the discussion in *Hazen Paper* was relevant only to the issue of whether a violation was willful. Thus, the court's earlier decision on punitive damages was not modified and punitive damages were reversed because there was no evidence of evil motive or reckless indifference. *See Glover v. McDonnell Douglas Corp.*, 12 F.3d 845, 848 (8th Cir.), *cert. denied*, 511 U.S. 1070 (1994).

intentional unlawful discrimination was more likely than not the reason underlying the adverse employment decision. *See Tincher v. Wal-Mart Stores, Inc.*, 1997 WL 340547 (7th Cir. June 20, 1997) *Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 509 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1692 (1997). Thus, the Court finds that defendant is entitled to judgment as a matter of law on the punitive damage issue.

G. *New Trial*

The decision whether to grant a new trial is within the discretion of the trial court, but generally new trials are granted only if the record presents prejudicial error or if substantial justice has not been done. *See Comerio v. Beatrice Foods Co.*, 616 F. Supp. 1423, 1428 (E.D. Mo. 1985). Defendant has not satisfied this standard.

II. *PLAINTIFF'S MOTION FOR FURTHER EQUITABLE RELIEF*

Plaintiff seeks equitable relief in the form of front pay through his 65th birthday totaling $379,321.66. Additionally, plaintiff's counsel seeks attorneys' fees and costs in the amount of $138,718.34.

Defendant maintains that plaintiff is not entitled to front pay because he did not submit the issue of the amount of front pay to be awarded to the jury, because there is no evidence to support a front pay award and because any such award would be an excessive and improper windfall. Finally, defendant claims that the amount of requested attorneys' fees is unreasonable and offers a number of suggestions for the reduction of the fees.

Appendix B

A. *Front Pay*

Defendant acknowledges that whether a plaintiff should be reinstated is an equitable issue for the court, but cites cases from the Third, Sixth and Ninth Circuits suggesting that the amount of front pay to be awarded should be submitted to the jury.

The Eighth Circuit has recently resolved this issue. In *Newhouse v. McCormick & Co.*, 110 F.3d 635, 643 (8th Cir. 1997), the court stated: "We . . . expressly hold that front pay, including the determination of how much front pay to award, is an equitable issue for the court." Therefore, the Court will determine the amount of front pay to be awarded.

Defendant next argues that plaintiff failed to offer evidence to support a front pay award on issues such as plaintiff's intention to continue working or the scope of any planned employment search. (Defendant's Suggestions in Opposition to Plaintiff's Motion for Further Equitable Relief at 3) Defendant offered two affidavits on the issue of plaintiff's employment options in the insurance field and notes typed by plaintiff that suggest he intended to remain with the company until age 62, not age 65. In reply, plaintiff urges the Court to presume that plaintiff would have remained employed until age 65. (Plaintiff's Reply at 2) Additionally, plaintiff argues that the notes were not admitted into evidence. (Plaintiff's Reply at 4) While plaintiff in his reply suggestions takes the position that there is substantial evidence to support a front pay award, plaintiff originally made the following request: "To make Plaintiff Ted Denesha whole, this Court must hold a hearing to determine appropriate *future* relief—

whether he is entitled to reinstatement or front pay in lieu thereof." (Plaintiff's Motion for Further Equitable Relief at 3)

Had the parties stipulated to the affidavits, notes and other evidence to which the parties refer in their briefing, a hearing would not be necessary. However, based on the parties' briefing, the Court believes the parties are opposed to the Court considering the issue based on the affidavits, notes and other evidence as submitted. Thus, a hearing will be set as soon as possible on this issue. The parties should be prepared at that time to present any evidence they wish the Court to consider on the issue of reinstatement or front pay. Should the parties reach some stipulation as to the evidence and affidavits that can be considered on this issue, they should immediately advise the Court that a hearing is unnecessary.

B. *Attorneys' Fees*

Defendant opposes plaintiff's requested attorneys' fees suggesting that they should be substantially lowered. Defendant makes several arguments including: (1) that plaintiff cannot recover fees related to his unsuccessful retaliation claim; (2) that plaintiff cannot recover fees for duplicative efforts of multiple attorneys; (3) that the fee statements are not adequately detailed; (4) that plaintiff cannot recover fees incurred for presenting a mock trial to a focus group; (5) that there is insufficient support for the hourly rates claimed; (6) that attorney rates cannot be recovered for clerical duties; and (7) that a reduction in the fee award is appropriate because the amount of a confidential settlement was improperly disclosed.

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Plaintiff has submitted the following in support of his attorney fee request: (1) Affidavit of Dennis E. Egan and time sheets of the Popham Law Firm; (2) Affidavit of Martin M. Meyers with attachments, including an opinion of Judge Joseph E. Stevens, Jr. and time sheets of the Meyers Law Firm; (3) Affidavit of Dianne McGovern, Office Administrator of the Popham Law Firm; (4) Affidavit of Sue Phillips; and (5) Affidavit of Kelly L. McClelland.

While defendant maintains that the affidavits submitted by plaintiff do not demonstrate that any counsel has actually been paid by a client the hourly rates they claim, there has been no objection to the Court's consideration of the evidence submitted on the attorney fee issue. Neither party has requested an opportunity to present evidence on the attorney fee issue. Thus, the Court will decide this issue on the basis of the information presently before it.

1. *Applicable Legal Standards*

Prevailing plaintiffs in ADEA cases are entitled to reasonable attorneys' fees. *See* 29 U.S.C. § 626(b) (incorporating 29 U.S.C. § 216(b)); *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974).

In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the court enumerated twelve factors that courts should consider when determining the amount of attorneys' fees to award in a Title VII case. The Eighth Circuit Court of Appeals announced its approval of these twelve factors in *Cleverly v. Western Electric Co.*, 594 F.2d 638, 642 (8th Cir. 1979), a case involving the ADEA. The factors

to be considered consist of: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

As set forth in *Roche v. City of Normandy*, 566 F. Supp. 37 (E.D. Mo. 1983), courts should consider the factors in the following manner:

> First, a determination is made of the number of hours spent by plaintiff's counsel, and in what manner. Second, a value is placed on those services by consideration of the customary fee charged by plaintiff's counsel. Finally, this initial figure is adjusted by consideration of the remaining factors.

Id. at 41.

2. *Analysis Of Appropriate Fee*

a. *Hourly Rate*

Plaintiff's counsel seek compensation at the following hourly rates: Mr. Egan $200; Mr. Meyers $195; and Mr.

Thornberry $50 prior to September 1995 and $90 after September 1995. Plaintiff's counsel refer to cases in which Mr. Egan was awarded $185 per hour in 1993 and Mr. Meyers $175 per hour in 1994. This Court has recently awarded fees of $150 per hour to similarly experienced counsel.

Defense counsel suggests that the hourly rate awarded plaintiff's counsel should be the same rate that he charges defendant, $125 per hour. However, defense counsel failed to advise whether this is the rate at which he bills all clients or a special rate negotiated with defendant. The Court's familiarity with the Kansas City market would indicate that $125 per hour would generally be below market rates for attorneys with the experience of plaintiff's and defendant's counsel. Defense counsel offers no other evidence to counter the evidence of market rates presented by plaintiff's affidavits.

Based on this Court's prior awards and the rates allowed by other judges in the Western District of Missouri and the Eighth Circuit, the Court concludes that $170 per hour for both Mr. Egan's and Mr. Meyers' time would be reasonable. Counsel sought a $5 per hour difference in the fees apparently to compensate for Mr. Egan's greater trial experience. However, given that Mr. Meyers was lead counsel in the case until Mr. Egan began assisting him approximately one month prior to trial, the Court concludes that the same hourly rate for both counsel is appropriate.

There has been no suggestion that $50 and $90 per hour for Mr. Thornberry's time would be unreasonable and, thus, these rates will be awarded as requested.

b. *Reasonable Time*

Defendant challenges a number of the items included in the attorney fee request. First, defendant argues that it should not have to pay for duplicative time or for Mr. Egan to learn about the file prior to trial. As defense counsel points out, Mr. Egan had 170 hours in the case compared to Mr. Meyers' 351.25. Mr. Egan did not become involved in the case until May of 1996, approximately one month prior to trial, and put on only two witnesses at trial, Vyck Shanes and Julie Clark. The Court will not require defendant to pay for time spent educating additional counsel about the case one month before trial. The time spent by Mr. Egan on May 14, 1996 (4.5 hours) and on June 6, 1996 (8.0 hours) will be excluded from the time awarded.

Likewise, the issues in the case were not so complex that they warranted three counsel for plaintiff throughout trial. Thus, at trial, defendant will be required only to pay for the time of Mr. Meyers and Mr. Egan. Mr. Thornberry's trial time of 62.25 hours will be excluded.

Next, defendant argues that plaintiff's counsel's time spent in conducting a mock trial should not be borne by defendant. While plaintiff's counsel may believe that the mock trial enhanced their preparation and enabled them to make a more effective presentation, the case could certainly have been tried without this type of pretrial preparation. The Court will disallow all fees and costs associated with the mock trial as follows: Mr. Egan 1.0 hour on 5/22/96; Mr. Meyers 15.0 hours on 4/30/96, 5/1/96 and 5/2/96; Mr. Thornberry 30.5 hours on 4/29/96, 4/30/96, 5/1/96, 5/2/96 and 5/3/96.

Defense counsel next seeks to exclude $4,125 in attorneys' fees which defendant claims are clerical in nature. A review of Defendant's Exhibit 7, attached to Defendant's Suggestions in Opposition to Plaintiff's Motion for Further Equitable Relief, reflects a number of items for which defendant's objections appear well taken. (*See* entries of 4/12/95 (1.0 SCT, copying and mailing); 12/14/95 (.5 SCT, deliver interrogatory answers to defendant); 1/16/96 (.5 SCT, deliver exhibit index); 6/7/96 (1.5 SCT, transport television to courthouse); 6/8/96 (1.0 SCT, compile trial supplies); 6/9/96 (2.5 SCT, put defendant's exhibits in box). Other time spent in organizing and preparing exhibits would seem to be appropriate for an associate familiar with the case. Thus, this time will not be excluded.

c. *Unsuccessful Claims*

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the United States Supreme Court set forth standards for determining the proper amount of an award of attorneys' fees, including guidance on awarding fees where the plaintiff was not successful on all claims.[7] The Court stated:

> We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount

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7. The action to recover attorneys' fees in *Hensley* was brought under 42 U.S.C. § 1988. However, the reasoning in *Hensley* is "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley*, 461 U.S. at 433 n.7. *See Heiar v. Crawford County*, 746 F.2d 1190, 1204 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (in assessing attorneys' fees in ADEA action, court should be guided by *Hensley* standards).

> of an award of attorney's fees under 42 U.S.C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Id. at 440.

As set forth by the Eighth Circuit in *Easley v. Empire Inc.*, 757 F.2d 923 (8th Cir. 1985):

> The Supreme Court has characterized the extent of a plaintiff's success as the "most critical factor" in adjusting fee awards, [*Hensley*, 461 U.S.] at 436, but has said that where claims go to common cores of facts and related legal theories, a district court is not required to mechanically apportion fees based on the number of issues on which the prevailing party was actually successful. *Id.* at 438. The focus should be on "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435.

Easley, 757 F.2d at 932. In a situation very similar to that before this Court, the United States District Court for the District of Minnesota found:

> Because [plaintiff's] discrimination and reprisal claim share common facts and involve related legal theories, the fee award cannot be mechanically based on the success and failure of those claims. Rather, the court must examine the relationship between the significance of the overall relief obtained by plaintiff in relation to the hours reasonably expended on the litigation. It is obvious that [plaintiff] succeeded on the central issue of age discrimination and that, taking the scope of the litigation as a whole, [plaintiff] obtained the major part of the relief he sought. Thus, [plaintiff's] counsel "should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435. The court finds that the hours claimed to have been expended by [plaintiff's] counsel are reasonable given the overall result obtained.

Ryther v. KARE 11, 864 F. Supp. 1525, 1533 (D. Minn. 1994).

Defendant's argument that the award of attorneys' fees should be reduced because plaintiff did not prevail on his retaliation claim must be rejected. Despite plaintiff's unsuccessful retaliation claim, the Court finds that overall plaintiff's counsel achieved excellent results, rather than only limited success. Given the overall results obtained by plaintiff's counsel, their fees should not be discounted for work done on the related retaliation claim.

Appendix B

The Court has reduced Mr. Egan's time by 13.5 hours, Mr. Meyers' time by 15.0 hours and Mr. Thornberry's time by 99.75 hours (30.5 hours relating to the mock trial, 7.0 hours for clerical duties and 62.25 hours attending trial). Thus, the total in attorney time awarded is $108,545.00: 156.5 hours or $26,605.00 for Mr. Egan; 336.25 hours or $57,162.50 for Mr. Meyers; and 299.75 hours or $24,777.50 for Mr. Thornberry.[8] Additionally, paralegal expenses of $82.50 and expenses of $1,084.09 are awarded, making the total award $109,711.59.[9]

III. *CONCLUSION*

Based on the foregoing, it is

ORDERED that Defendant's Second Amended Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial or, in the Further Alternative, for Remittitur of Punitive Damage Verdict (doc #111) is granted in part and denied in part as set forth above. It is further

ORDERED that Plaintiff's Motion for Further Equitable Relief and Judgment Under the Age Discrimination in Employment Act and the Missouri Human Rights Act (doc #102) is granted in part and denied in part as set forth above.

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8. Per plaintiff's request, Mr. Thornberry's time prior to September 1995 (55 hours) was awarded at the rate of $50.00 per hour and the remainder of his time was awarded at the rate of $90.00 per hour.

9. Those expenses relating to the mock trial have been deducted from the amount awarded.

Appendix B

Attorneys' fees and expenses in the amount of $109,711.59 are awarded. The issue of front pay is deferred pending a hearing on this issue. It is further

ORDERED that the parties are directed to confer and then advise the Court as to when they are available for a hearing on the issue of front pay. It is further

ORDERED that Defendant's Motion for Extension of Time to Respond to Plaintiff's Motion for Further Equitable Relief (doc #112) is granted.

s/ Sarah W. Hays
SARAH W. HAYS
UNITED STATES MAGISTRATE JUDGE

Date: July 28, 1997
Kansas City, Missouri

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED OCTOBER 20, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 95-0122-CV-W-BD

CHARLES THEODORE DENESHA,

Plaintiff,

vs.

FARMERS INSURANCE EXCHANGE,

Defendant.

ORDER

A hearing on the issue of front pay was held on September 3, 1997. Plaintiff presented the testimony of Gerald Olson and the plaintiff, Charles Denesha. Defendant called Lewis Vierling and Kevin McKenzie. Also pending before the Court is a request for post-trial attorneys' fees. For the reasons set forth in this Order, the Court finds plaintiff entitled to $61,666.67 in front pay and $40,195.38 in post-trial attorneys' fees.

Appendix C

I. FRONT PAY

Plaintiff seeks front pay through his 65th birthday in the amount of $232,367.00.[1] Further, plaintiff argues that the burden of proving that plaintiff failed to mitigate his damages is upon defendant and that the duty of plaintiff to mitigate is not onerous and does not require that plaintiff be successful in finding other employment. (Plaintiff's Brief in Support of Front Pay Award at 4)

Defendant's position is that front pay is discretionary, not mandatory and that front pay should be denied because of the award of liquidated damages imposed in this case. (Defendant's Memorandum of Law Regarding Plaintiff's Front Pay Demand at 1-2) Defendant also claims that front pay should not be available where plaintiff is reasonably likely to achieve comparable employment or where plaintiff has failed to mitigate damages. (*Id.* at 307)

A. *Evidence*

Mr. Denesha testified that following his termination from Farmers he contacted insurance companies by telephone and answered classified advertisements. (Tr. at. 37) However, he has been unable to locate work as an insurance adjuster. Plaintiff indicated that there are many different types of

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1. Plaintiff's Further Briefing Regarding Front Pay states that Dr. Olson's report, Exh. 1001, should be reduced by $16,899.00, an amount representing calculations for 1996 lost income through the trial date. Plaintiff seeks front pay from the date of the jury's verdict forward and the figures provided by Dr. Olson have been adjusted to correspond with plaintiff's claim.

insurance adjusters and that his area of expertise was bodily injury claims arising from automobile accidents, i.e. liability. (Tr. at 38) He had one interview with Preferred Risk in Independence for a position as a multi-line adjuster. (Tr. at 39) However, someone else was hired for that job. Plaintiff acknowledged that his skills as a liability adjuster would be transferable to other types of adjusting jobs and that most employers provide some type of training for newly employed adjusters. Because he was unable to obtain a job as an adjuster, plaintiff applied for a position as a substitute teacher and also accepted a part time job demonstrating magic at U.S. Toys. (Tr. at 41)

Plaintiff testified that before he encountered the discriminatory treatment at Farmers he had not considered retiring. (Tr. at. 42-43) At the time of the hearing, plaintiff indicated that he was sixty and had no plans to retire at age 62. (Tr. at 43) Defendant's Exhibit 1 consisted of notes prepared by plaintiff following conversations with his supervisors at Farmers prior to his termination. He prepared the notes at home, had an opportunity to review and edit them and provided the notes to the EEOC as support for his claims against the company. (Tr. at 57-58) On page four, Mr. Denesha wrote: "I asked him about retirement. I really hadn't considered retirement until this came up. I wanted to work until I was sixty two years old." (Def. Exh. 1 at 0056)

Dr. Olson analyzed plaintiff's projected earnings through age sixty-five had he remained employed by the defendant. Dr. Olson allowed the base earnings and alternative earnings of plaintiff to grow at two percent per year. Dr. Olson concluded that plaintiff had a net loss of compensation of

$249,266.00 from 1996 forward to age sixty-five. Following the hearing, plaintiff indicted that the reported loss should be reduced by $16,899.00, thereby reducing plaintiff's front pay calculations to $232,367.00. (Plaintiff's Further Briefing Regarding Front Pay at 1)

Defendant presented the testimony of Lewis E. Vierling of Management Consulting and Rehabilitation Services, a company providing medical management and career development to individuals who have been injured. (Tr. at 68) Mr. Vierling is a vocational consultant who provides career counseling. (Tr. at 69) After reviewing plaintiff's personnel file, answers to interrogatories and deposition, Mr. Vierling was of the opinion that plaintiff was employable within the local labor market. (Tr. at 70) Mr. Vierling concluded that occupations in addition to claims adjuster and teacher to which plaintiff had the skill level to transfer included paralegal, sales representative, training representative, personnel recruiter, purchasing agent and underwriter. (Tr. at 79; Def. Exh. 12)

In addition to Mr. Vierling, defendant presented the testimony of Kevin McKenzie of Pilot Catastrophe Services, Inc. Pilot Catastrophe Services, Inc. adjusts claims for insurance companies by providing personnel to adjust claims when there is a catastrophe. In addition, the company also performs regular business or non-catastrophic work for insurance companies. (Tr. at 107) Mr. McKenzie, a human resources manager for the company, testified the company has hired persons: (1) who have been fired by insurance companies; (2) who have filed lawsuits against their former employers in the insurance industry; and (3) who are over

the age of fifty. In fact, Mr. McKenzie testified that people who had left insurance companies were a good source of employees for the company. (Tr. at 109-110)

B. *Legal Analysis*

Front pay is an equitable remedy which the Court may award under the Age Discrimination in Employment Act (ADEA) to make the injured party whole. *See Smith v. World Ins. Co.*, 38 F.3d 1456, 1466 (8th Cir. 1994). Front pay may be awarded in lieu of, but not in addition to, reinstatement. *See Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 730 (8th Cir.), *cert. denied*, 506 U.S. 1014 (1992) . While some cases suggest that reinstatement is the preferred remedy to avoid a loss of future income, front pay in lieu of reinstatement may be appropriate "when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible." *E.E.O.C. v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985)

In this case, plaintiff does not actively seek reinstatement, nor does defendant seriously suggest that reinstatement would be appropriate. Given the nature of the testimony that was presented at trial concerning plaintiff's relationship with his former supervisor as well as other managers within the company, the Court finds that the animosity between the parties would not allow for a productive or amicable working relationship. Thus, reinstatement is not an appropriate remedy and front pay in lieu of reinstatement should be awarded. An award of future damages in lieu of reinstatement furthers the remedial purposes of the ADEA by assuring that the aggrieved

party is returned as nearly as possible to the situation he would have enjoyed but for the defendant's illegal conduct. *Id.* at 1173.[2]

As to the issue of front pay, the evidence convinces the Court that front pay should be awarded to age sixty-two, the age to which plaintiff, in his written notes, indicated he intended to work.

The difficult issue for the Court in this case is the amount of front pay to be awarded. An ADEA plaintiff must attempt to mitigate damages by exercising reasonable care and diligence in seeking reemployment after termination. *See Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1345 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988). The defendant bears the burden of showing that there were suitable positions and that the plaintiff failed to use reasonable care in seeking them. *Id. See also Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1106 (8th Cir. 1996) (burden on employer to show that the plaintiff has failed to mitigate his damages). The plaintiff need not be successful in his job search; all that is required is an honest, good faith effort. *See Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065 (8th Cir. 1988). Any wages the plaintiff actually earned after termination plus the amount plaintiff would have earned if he had made reasonable efforts

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2. Defendant argued that front pay should be denied because of the award of liquidated damages in the case. This argument has been rejected by the Eighth Circuit which has held that "[t]he jury's finding of willfulness and the resulting award of liquidated damages simply does not affect the district court's determination of the appropriate equitable relief." *Newhouse v. McCormick & Co.*, 110 F.3d 635, 643 (8th Cir. 1997).

must be subtracted from the award. *See Cassino*, 817 F.2d at 1345.

While the Court is cognizant of the difficulties that plaintiff may have experienced in seeking work at a level comparable to his position with the defendant, the Court is persuaded by the testimony of Mr. Vierling that there were a number of different kinds of positions that plaintiff could have tried to obtain. Between December of 1994 and September 3, 1997, plaintiff produced only one job application he had made. (Tr. at 56) Plaintiff made this application several weeks before the hearing in September of 1997. (Tr. at 44) Plaintiff did not seek employment through employment agencies, by attending meetings of the claims adjusters' association or by applying for employment advertised in trade magazines for claims adjusters. (Tr. at 50) Given plaintiff's education and prior job experience, as well as the testimony of Mr. Vierling that jobs existed in the Kansas City economy which plaintiff was capable of doing, the Court finds that defendant has demonstrated that plaintiff could have obtained a full time job had he used reasonable mitigation efforts.

The cases the Court has reviewed persuade the Court that this conclusion is warranted by the law and the evidence. For example, in *Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992), the Eighth Circuit reversed the trial court's finding that plaintiff had failed to mitigate his damages. However, in that case plaintiff contacted friends, business contacts and associates about another job. He began a job search by answering newspaper and periodical ads. He sent out between 150 and 200 job application letters. *Id.* The

Court is not suggesting that only a job search of this magnitude could be considered to constitute reasonable mitigation efforts. However, by contrast, between the time of the jury verdict and the date of the hearing on the front pay issue, plaintiff could produce only one job application for a job in the insurance industry and this application was not sent until approximately two weeks prior to the hearing before the Court. Nor did plaintiff identify any other job applications he had made for full-time employment between June of 1996 and September of 1997.

Mr. Vierling found that the skills that plaintiff had acquired through his working experience would generally transfer to 67 occupational possibilities. Some of these occupations would have required additional training. Thus, Mr. Vierling was of the opinion that the occupation of insurance claims adjuster was still the most appropriate job for plaintiff to pursue. Mr. Vierling was aware of ongoing job availability in the insurance field in Kansas City and of a number of insurance companies that hire individuals with plaintiff's experience, skill and ability. (Def. Exh. 12 at 8)

Mr. Vierling's report estimates salary ranges for five positions and includes starting salaries and salary ranges for persons with five or more years of experience. Mr. Vierling estimated a median salary for an individual with plaintiff's level of experience, skill and ability at $45,000 to $50,000 per year. No one directly addressed the issue of plaintiff's starting salary if he obtained employment with a new company or in an adjuster's position that required additional training. The Court will assume that if plaintiff were beginning a new position with a new company, he would be

employed in the starting salary range. The Court finds that had plaintiff used reasonable efforts, he could have located a claims adjuster position with a starting salary of approximately $25,000 to $30,000. Thus, the Court will calculate front pay as the difference between plaintiff's estimated salary had he remained at Farmers and a starting salary for an insurance adjuster, a position that the Court finds plaintiff, with a reasonable effort, could have obtained.

In calculating front pay, the parties differ over the percentage of plaintiff's pay that accurately reflects his benefits. Dr. Olson used 44 percent of earnings in his calculations. However, Dr. Olson recognized if the car allowance and employer contributions for social security payments were eliminated, the benefits portion of the lost income would be approximately 32 percent of plaintiff's salary. (Tr. at 19) The Court finds that a reduction in the benefits calculation from 44 percent is warranted since the employer's contributions to social security were not paid to plaintiff. The differential between benefits at the two salary levels will also be awarded.

Using this formula and rounding the calculations in plaintiff's favor, the Court awards plaintiff 20,000.00 per year for three years and one month, for an award of $61,666.67 in front pay.

II. ATTORNEYS' FEES

Plaintiff seeks an award of post-trial attorneys' fees and expenses in the amount of $46,160.38. This represents $39,245.38 in fees and expenses for the Meyers Law Firm

and $6,915.00 in fees for the Popham Law Firm. Defendant argues that plaintiff has failed to establish that this fee request is reasonable and that the demand must be substantially reduced because: (1) plaintiff was unsuccessful on the punitive damage claim; (2) the bill reflects conflicting and duplicative entries; (3) there should be no recovery for clerical tasks; and (4) there were an excessive number of conferences between lawyers.

The standards for awarding attorneys' fees as well as the rates to be utilized in this case were previously addressed by the Court in its Order of July 23, 1997. Clearly, the prevailing party may recover attorneys' fees for time spent on post-trial motions and the recovery of attorneys' fees.

The Court agrees with defendant's argument and the case law cited that plaintiff is not entitled to recover for post-trial time spent on the punitive damage issue since plaintiff was not the prevailing party on that issue. However, defendant's listing of the attorney time spent on that issue is not entirely accurate. A review of the billing statement suggests that the time attributed to work on the punitive damage issue post-trial includes the following entries for the Meyers and Popham Law Firms:

Appendix C

DEDUCTION FOR TIME ASSOCIATED
WITH PUNITIVE DAMAGE CLAIM

Date	*Attorney*	*Time*	*Deduction*
07/10/96	MMM	3.25	$ 552.50
07/16/96	MMM	3.50	595.00
07/22/96	MMM	0.50	85.00
07/24/96	MMM	0.25	42.50
07/29/96	MMM	1.50	255.00
07/30/96	SCT	2.50	225.00
08/06/96	SCT	3.00	270.00
08/13/96	MMM	2.00	340.00
08/15/96	MMM	1.50	255.00
08/16/96	MMM	0.50	85.00
09/26/96	MMM	0.50	85.00
10/13/96	MMM	2.00	340.00
10/14/96	MMM	2.25	382.50
10/23/96	MMM	1.50	255.00
01/09/97	MMM	9.00	1,530.00
08/04/97	MMM	1.75	297.50
08/12/97	MMM	0.50	85.00
08/16/97	DEE	1.50	255.00
	TOTAL DEDUCTION		$5,935.00

Thus, the fee will be reduced by $5,935.00 for time associated with the punitive damage issue.

The "duplicative time entries" of which defendant complains appear to be separate entries on the same day by counsel. However, these entries have different descriptions

of the work accomplished. The fact that separate entries were sometimes made does not suggest the time was unreasonable.

Defendant points out that an entry of June 27, 1996 by "CLV" appears to be work on an unrelated case. Thus, this $30.00 charge will be eliminated.

Defendant also contends that there were an excessive number of telephone conferences between counsel which should be substantially reduced. The post-trial issues were complicated and work was divided among several counsel. Thus, counsel needed to confer about the issues. The Court is unwilling to conclude that these conferences were unnecessary or unproductive.

For the reasons discussed above, post-trial attorneys' fees in the amount of $40,195.38 are awarded.

III. SUMMARY OF COURT'S HOLDINGS

The parties also requested that the Court clarify its earlier Order to make clear the Court's intent that the Motion for a New Trial on the issue of punitive damages was denied. As a result of the briefing of the parties and the post-trial argument and hearings, relief in this case is granted as follows:

Defendant's Second Amended Motion for Judgment as a Matter of Law or in the Alternative, for a New Trial or, in the Further Alternative, for Remittitur of Punitive Damage Verdict (doc #111) is granted in part and denied in part. By its earlier Order of July 23, 1997, the Court granted the motion for judgment as a matter of law as to the punitive damage

claims raised by plaintiff. In all other respects, defendant's motion was denied. Thus, the Court denied the motion for judgment as a matter of law as to all claims except for the punitive damage claim and denied the motion for a new trial as to all claims, including the punitive damage claim.

Attorneys' fees and expenses of $109,711.59 were awarded on July 23, 1997. To that award, post-trial fees and expenses of $40,195.38 are awarded by this Order.

The Court previously indicated that the jury award of $102,614.00 would be doubled based on the jury's finding that the actions of defendant were wilful. To the jury's award which was doubled, the Court in this Order has awarded $61,666.67 in front pay.

Thus, plaintiff is hereby awarded the following sums:

Jury verdict, liquidated damages, front pay:	$266,894.67
Total attorneys' fees and expenses:	149,906.97
Total Award:	$416,801.64

IT IS SO ORDERED.

s/ Sarah W. Hays
SARAH W. HAYS
UNITED STATES MAGISTRATE JUDGE

Date: October 20, 1997
Kansas City, Missouri

APPENDIX D — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION DATED NOVEMBER 21, 1997

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 95-0122-CV-W-BD

CHARLES THEODORE DENESHA,

Plaintiff,

v.

FARMERS INSURANCE EXCHANGE,

Defendant (s).

AMENDED
JUDGMENT IN A CIVIL CASE

* * *

XX **Decision by Court.** This action came before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Defendant's Second Amended Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial

or, in the Further Alternative, for Remittitur of Punitive Damage Verdict (doc #111) is granted in part and denied in part. By its earlier Order of July 28, 1997. The Court granted the motion for judgment as a matter of law as to the punitive damage claims raised by the plaintiff. In all other respects, defendant's motion was denied. Thus, the Court denied the motion for judgment as a matter of law as to all claims except for the punitive damage claim and denied the motion for a new trial as to all claims, including the punitive damage claim.

Attorney's fees and expenses of $109,711.59 were awarded on July 28, 1997. To that award, post-trial fees and expenses of $40,195.38 are awarded by this Order.

The previously indicated that the jury award of $102,614.00 would be doubled based on the jury's finding that the actions of defendant were wilful. To the jury's award which was doubled, the Court in this Order has awarded $61,666.67 in front pay.

Thus, plaintiff is hereby awarded the following sums:

Jury Verdict, liquidated damages front pay: $266,894.67
Total attorney's fees and expenses: 149,906.97

Total Award: $416,801.64

November 21, 1997
Date

R.F. Connor
Clerk

s/ [illegible]
(by) Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED DECEMBER 29, 1998

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-4373/4374WMKC

Charles Theodore Denesha,

Appellee/Cross-Appellant,

vs.

Farmers Insurance Exchange,

Appellant/Cross-Appellee.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge Beam, Judge Loken, Judge Hansen, and Judge Morris Sheppard Arnold would grant the petition only as to part II.B.3 of the panel's opinion, that being the punitive damages issue.

The petition for rehearing by the panel is also denied.

December 29, 1998

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F — RELEVANT STATUTES

29 U.S.C. § 623

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

Appendix F

29 U.S.C. § 626

§ 626. Recordkeeping, investigation, and enforcement

* * *

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

* * *

(2)

No. 98-1573

Supreme Court, U.S.
FILED
APR 13 1999
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

FARMERS INSURANCE EXCHANGE

Petitioner,

v.

CHARLES THEODORE DENESHA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DENNIS E. EGAN
THE POPHAM LAW FIRM
1300 Commerce Trust Building
922 Walnut
Kansas City MO 64106
(816) 221 2288
FAX (816) 221 3339

MARTIN M. MEYERS
Counsel of Record
THE MEYERS LAW FIRM
2850 City Center Square
1100 Main Street
Kansas City MO 64105
(816) 421 4040
FAX (816) 421 4020

Attorneys for Respondent

14 pp

QUESTIONS PRESENTED FOR REVIEW

1. The Case Involves Punitive Damages Awarded Under Missouri Law Which Petitioner Admits Meets Due Process Standards. Should the Petition be Denied Because Petitioner's Real Complaint is That the Eighth Circuit, by Holding that the Evidence Supported an Award of Punitive Damages, Misapplied a Properly Stated and Admittedly Constitutional Rule of Missouri Law?

2. The Court of Appeals' Opinion Specifically Holds That Plaintiff's Evidence Was Sufficient for the Jury to Find That the Petitioner's Stated Reasons for its Discharge of Plaintiff Were Pretextual. The Opinion Also Describes in Detail How the Evidence Proved Pretext. Should this Court Deny the Petition Based on Petitioner's False Statement That the Court of Appeals Held Evidence of Pretext is Unnecessary?

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MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE

This Petition for Writ of Certiorari is a plea to this Court to re-decide factual issues decided by a jury. Both the District Court and the Eighth Circuit Court of Appeals wrote lengthy opinions summarizing the evidence that supports the verdict. Petitioner's Statement of the Case ignores this evidence, instead setting forth its own evidence that obviously was rejected by the jury. As just one example, Petitioner asserts that both (1) when it placed Denesha on progressive discipline and (2) when it discharged him, it acted "in full compliance with . . . procedures." (Pet. 2, 3). This assertion is shocking, considering that the opinion of the Court of Appeals contains the following observations in that regard:

- "When Denesha complained about the salary decision, Wilfong and White treated him differently from other employees, *failing to follow various office procedures.*" (4a).

- "Evidence presented at trial indicates White also *failed to follow company procedure* in compiling the negative information." (8a, n.4).

- "Denesha was placed on progressive discipline in June 1993 *even though his performance was comparable to that of other FCRs* and despite the fact that he led the office in reduction of bodily injury ('BI') costs." (9a-10a).

- "Wilfong did ride along with other employees and testified at trial that he *consciously decided not to follow procedures* with Denesha because he did not think it would help him." (11a).

- "Nonetheless, a regional auditor observed in March of 1994 that Denesha had made 24-hour contact with claimants 100% of the time. *This finding conflicted with the claims of White and Wilfong, who characterized Denesha as consistently below the 90% goal for 24-hour contact.* These facts support the jury's conclusion that Farmers' actions were the product of discriminatory animus with respect to Denesha's age." (12a).

By misstating the evidence, Petitioner unwittingly reveals that its real complaint is not with the rules of law applied by the Court of Appeals but with the facts found by the jury.

CORRECTED STATEMENT OF THE CASE WITH CITATIONS TO THE OPINION BELOW

In November 1992 Denesha's branch claims office merged with another office and Denesha was reassigned. (3a). In 17 years as a claims representative ("CR") with Farmers prior to the merger, Denesha had never been denied a raise or formally disciplined; his last performance evaluation was "very good." (3a, 7a). In December 1992 John White, the branch claims manager for Denesha's new office, altered Denesha's salary review on the basis of irrelevant, perhaps contrived information, in order to justify denying Denesha a raise. (3a, 15a). White went beyond the review period in question in order to find examples of poor work performance to justify denial of the raise. (3a). In denying Denesha a raise, White stated that he relied in part on customer complaints against Denesha; however, the evidence showed that no such complaints had been made prior to the denial of Denesha's raise. (9a). The jury found that Farmers' denial of Denesha's raise in December 1992 was based on age discrimination, and the Court of Appeals found that the record amply supports the jury's conclusion. (7a).

In both the November and December 1992 case review meetings Denesha was told by his new supervisor, Joe Wilfong, that the younger claim representatives "were running circles around" the older ones. (9a). In the Spring of 1993 branch claim manager White himself stated that the only way to improve things would be to get rid of the "old heads" around the office. (9a).

Wilfong began recording customer complaints against Denesha in January 1993, even though younger CRs were given several warnings before any customer complaints were recorded against them. (10a-11a). Although Wilfong did so with younger CRs, he refused to perform mandatory training ride alongs with Denesha in 1993, something even manager John White testified he was "shocked" to learn. (11a). Thereafter, in June 1993, Denesha was placed on probation even though his performance was comparable to that of other CRs. (9a-10a). Despite receiving the most assignments of any CR, Denesha led the office in reduction of BI costs at the time he was put on probation. (10a). Both White and Wilfong refused to review records showing that Denesha was being treated unfairly. (10a). After placing Denesha on discipline, White and Wilfong gave him goals that were unattainable. (11a). Denesha was denied the same opportunity given to other CRs to catch up status reports. (11a).

Despite the fact that in September 1993 Denesha settled more claims than any other CR, he was demoted to office claims representative in October 1993. (11a). Denesha was fired in May 1994 for failing to meet the goal of making 24 hour contact with claimants 90% of the time, even though an audit by the Regional Office showed that he made such contact 100% of the time. (4a, 12a).

Denesha filed two separate EEOC charges while he was still employed with Farmers, one following the denial of his raise in December 1992, and one after he was placed on probation in June 1993, both of which Farmers refused to address. (22a).

Based on the foregoing evidence, the jury found that Farmers discharge of Denesha violated both the ADEA and Missouri's Human Rights Act and awarded Denesha both actual and punitive damages. (2a). After noting that under Missouri law punitive damages may only be awarded for conduct that is "outrageous because of the defendant's evil motive or reckless indifference to the rights of others" (21a), the Court of Appeals held:

> Considering the evidence in the light most favorable to Denesha, there was sufficient evidence of outrageousness to permit a reasonable juror to award punitive damages. As in *Kimzey*, management participated directly in the discriminatory conduct. *See* 107 F.3d at 575. Wilfong, Denesha's direct supervisor, on several occasions stated that the work of older employees was inferior to younger employees. Though these statements were brought to the attention of White, the office manager, he failed to take the matter seriously, instead advising Wilfong to use different language in the future. In addition, Farmers failed to address EEOC complaints filed by Denesha in January 1993 following a meeting between himself and the head of the personnel department regarding the denial of a raise and again in May 1993 after White refused to examine statistics showing that his workload was unfair, despite an audit of the statistics used by Wilfong contradicting his perception of plaintiff's performance. There was also evidence to support a determination that White and Wilfong held older employees to different

> standards than younger employees. Deliberately restricting opportunities and rewards based on age is a violation of the law. It is precisely these type of attitudes and actions that punitive damages are designed to deter. In sum, the actions of White and Wilfong permit an inference of discriminatory animus on the part of key decision makers, thus establishing the quantum of outrageousness necessary to support an award of punitive damages.

(21a-22a).

REASONS FOR DENYING THE WRIT

I.

THIS CASE INVOLVES PUNITIVE DAMAGES AWARDED UNDER MISSOURI LAW WHICH PETITIONER ADMITS MEETS DUE PROCESS STANDARDS. PETITIONER'S REAL COMPLAINT THAT THE EIGHTH CIRCUIT MISAPPLIED A PROPERLY STATED AND ADMITTEDLY CONSTITUTIONAL RULE OF MISSOURI LAW DOES NOT WARRANT REVIEW BY THIS COURT .

Petitioner's argument that the "Eighth Circuit equated a finding of intentional discrimination with a finding of outrageousness" (Pet. 5) is based on taking out of context the final sentence of the paragraph in the opinion that summarizes the evidence supporting punitive damages. The entire paragraph (reproduced above) shows clearly that the Eighth Circuit correctly applied Missouri law concerning punitive damages and did not, as petitioner claims, "equate a finding of intentional discrimination with a finding of outrageousness."

The Eighth Circuit's opinion correctly states that in order to recover punitive damages under Missouri law there

must be evidence of outrageous conduct, a standard higher than the willfulness finding that permits the recovery of liquidated damages under the ADEA:

> Under Missouri law, "'[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others.'" *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. 1989)(en banc) (quoting *Restatement (Second) of Torts* § 908(2) (1979)). Unlike the willfulness standard for liquidated damages specified under the ADEA, *see Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 1708-10 (1993), punitive damages issue under the MHRA only upon a finding of some element of outrage.

(21a).

Thus, the language of the opinion belies Petitioner's statement that "under the Eighth Circuit's decision, intentional age discrimination by itself constitutes outrageous conduct which justifies punitive damages." (Pet. 7). To the contrary, the opinion properly notes that punitive damages under Missouri law require proof of conduct not only beyond mere intentional discrimination, but beyond that required for a finding of willfulness under the ADEA.

Petitioner's own description of Missouri law regarding punitive damages is *identical* to the above quote from the Eighth Circuit's opinion. (Pet. 6). Even more importantly, Petitioner admits that Missouri's law satisfies due process:

> *The law in Missouri concerning punitive damages comports with these Due Process standards.* Under Missouri law, the recovery of punitive damages requires a threshold showing of "actual outrageousness" that

> surpasses that required for compensatory or liquidated damages.

(Pet. 6)(Emphasis added).

Stripped of the rhetoric and misrepresentations contained in its Petition, Farmers' real complaint is that "the evidence is insufficient to establish a finding of outrageousness." (Pet. 8). This amounts to a claim the Eighth Circuit misapplied a properly stated and admittedly Constitutional rule of Missouri law by holding that there was enough evidence of outrageous conduct to permit an award of punitive damages under Missouri law. Petitioner has paid little heed to the admonishment contained in Supreme Court Rule 10 that such a complaint will rarely result in the grant of a petition for writ of certiorari.

Farmers attempts to compare this case to the pending case of *Kolstad v. American Dental Association,* 139 F.3d 958 (D.C. Cir.), *cert. granted,* ___ U.S. ___, 119 S.Ct. 401, 142 L.Ed.2d 326 (1998). *Kolstad* presents the *unsettled* question of whether punitive damages under Title VII require a finding of egregious conduct. In contrast, the Eighth Circuit's opinion in this case applies *settled* Missouri law which has long required a finding of outrageous conduct to support an award of punitive damages. Because Missouri's admittedly Constitutional standard for awarding punitive damages has long been settled, this case presents no issue in need of review.

Finally, Farmers' laments that the Eighth Circuit's holding — which simply applies well-settled Missouri law to the facts of this case, finding a reasonable juror could find Farmers' conduct outrageous — will affect "thousands of cases" and will force innocent employers "to contend with massive punitive

damage awards."[1] (Pet. 9). Such lamentations, although unfounded, were predictable. Farmers has used other such jeremiads before to try to escape liability under the ADEA. *See American Association of Retired Persons v. Farmers Group, Inc.*, 943 F.2d 996, 1007 (9th Cir. 1991), where the court stated:

> Over the many years since the ADEA was first enacted, Farmers has been resolute in its opposition to the policies and purposes that animated that legislation. It embraced every opportunity to restrict benefits for older workers and ultimately went too far. As a result, it violated the ADEA by depriving older workers of the benefits to which they would otherwise have been entitled and by doing so for the purpose of driving them into retirement. Therefore, *despite Farmers' jeremiads and febrile arguments* it must now make the individual appellees whole.

(Emphasis added).

This Court should deny the petition so that Farmers will likewise have to make whole the plaintiff here who was similarly damaged by Farmers' opposition to the policies and purposes that animated legislation against age discrimination.

---

[1] Farmers also claims that Missouri's standard for punitive damages means that "every age discrimination verdict would include an award of punitive damages." (Pet. 7). However, Farmers does not explain why Missouri law would apply to "every" age discrimination claim nor why claimants would be "automatically entitle[d]" to punitive damages regardless of whether the factfinder awards them.

II.

THE COURT OF APPEALS' OPINION HOLDS THAT PLAINTIFF'S EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT THE PETITIONER'S STATED REASONS FOR ITS DISCHARGE OF PLAINTIFF WERE PRETEXTUAL. THE OPINION ALSO SETS FORTH HOW THE EVIDENCE PROVED PRETEXT. THIS COURT SHOULD DENY THE PETITION BASED ON PETITIONER'S FALSE CHARACTERIZATION OF THE COURT OF APPEALS HOLDING.

The second issue Petitioner claims justifies review is an alleged holding by the Eighth Circuit that "the employee did not have to rebut the employer's proffered reason for discharging the employee." (Point II, Pet. 10). The Eighth Circuit's opinion contains no such holding. To the contrary, the opinion affirmatively holds that "the record amply supports the jury's conclusion that the offered reasons were merely a pretext for underlying age discrimination" (7a). Additionally, the opinion specifically describes *how* the evidence showed that petitioner's stated reason for his discharge was pretextual:

> Nonetheless, a regional auditor observed in March of 1994 that Denesha had made 24-hour contact with claimants 100% of the time. This finding conflicted with the claims of White and Wilfong, who characterized Denesha as consistently below the required 90% goal for 24-hour contact. These facts support the jury's conclusion that Farmers' actions were the product of discriminatory animus with respect to Denesha's age.

(12a). Petitioner mischaracterizes the opinion out of an apparent recognition that under any fair reading of the opinion, this case presents no issue worthy of review.

Point II of the Petition simply repeats Farmers' silly but nonetheless oft-stated and uniformly rejected argument that because Farmers, as a part of an ongoing pattern of discrimination, demoted Denesha from field claim representative ("FCR") to office claims representative ("OCR") in October 1993, both courts below were required to ignore overwhelming evidence that the same two supervisors consistently discriminated against Denesha on the basis of his age from the time of the merger in November 1992 until the demotion in October 1993.[2] No case so holds, again explaining why Farmers feels compelled to mischaracterize the Eighth Circuit's holding in its attempt to gain an audience before this Court.

Because the opinion of the Eighth Circuit does not hold — or even imply — that a discrimination plaintiff need not prove that an employer's stated reason for discharging him is pretextual, Farmers' claimed fear that "lower courts will be inundated with litigation unrelated to the specific reasons for an employer's action" is simply another unfounded jeremiad. *See* p. 8, *supra.*

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

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[2] Included in the evidence that Farmers contends the jury could not consider on the discharge claim was the fact that in December 1992 Farmers denied Denesha a raise. The jury found the denial of a raise was due to age discrimination, a finding Farmers does not even challenge. Farmers simply omits any reference to this separate verdict from its petition.

Respectfully submitted,

MARTIN M. MEYERS
Counsel of Record
THE MEYERS LAW FIRM
2850 City Center Square
1100 Main Street
Kansas City MO 64105
(816) 421 4040
FAX (816) 421 4020

DENNIS E. EGAN
THE POPHAM LAW FIRM
1300 Commerce Trust Building
922 Walnut
Kansas City MO 64106
(816) 221 2288
FAX (816) 221 3999

ATTORNEYS FOR RESPONDENT